Supreme Court, U.S.
FILED

02 321 AUG 27 2002

OFFICE OF THE CLERK

No. 02-

IN THE

Supreme Court of the United States

MACHIPONGO LAND AND COAL CO., INC., VICTOR E. ERICKSON TRUST and JOSEPH NAUGHTON,

Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES, THE ENVIRONMENTAL QUALITY BOARD and ARTHUR A. DAVIS, Secretary of Environmental Resources,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI

JOEL R. BURCAT
CHRISTINE STEIB STICKLER
SAUL EWING LLP
Two North Second Street
7th Floor
Harrisburg, PA 17101
(717) 257-7506

CARL A. BELIN, JR.
Counsel of Record
BELIN & KUBISTA
P.O. Box 1
15 North Front Street
Clearfield, PA 16830
(814) 765-8972

Counsel for Petitioners

175310

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

18 cpp

QUESTIONS PRESENTED

In this regulatory takings case, the trial court found a taking of the Petitioners' coal estates in an area in Clearfield County, Pennsylvania. The Pennsylvania Supreme Court reversed and determined that, for purposes of the takings analysis, Pennsylvania property law providing for the unique status of the coal estate was abolished by this Court in *Keystone Bituminous Coal Ass'n v. DeBenedictis*. The Pennsylvania Supreme Court also refused to find that the regulated parcel was the proper denominator in the takings fraction in a manner contrary to *Penn Central Transportation Co. v. City of New York, Keystone Bituminous Coal Ass'n v. DeBenedictis* and the trial court's findings. Furthermore, it decided that the Respondents could present the defense of a nuisance even though the record established the state had permitted mining throughout the area both before and after the promulgation of the regulation, and even though Respondents admitted they did not present any evidence at trial that Petitioners would not receive a mining permit. Finally, the Pennsylvania Supreme Court refused to review a clearly erroneous factual determination made by the Commonwealth Court in dismissing one of the takings claims, even though there was no intermediate appellate court.

The questions presented for review are:

1. Is the proper denominator in the takings fraction from a vertical perspective the coal estate where the regulation prohibits all mining of coal in a 555 acre tract and the state's property law recognizes the coal estate as a separate and unique interest in land?

2. Is the proper denominator in the takings fraction from a horizontal perspective the coal estate in the regulated parcel where it has independent economic viability as it can be mined profitably as a separate and independent unit?

3. May a state avoid the payment of just compensation for a regulatory taking resulting from the adoption of a regulation that prohibits the mining of coal, based upon purported background principles of its nuisance law, where the state has permitted others to mine coal in the same area both before and after the adoption of the regulation?

4. Where there was no intermediate appellate court, should the lower court have used the standard of review set forth in *Easley v. Cromartie* to evaluate the trial court's factual findings in its dismissal of one of the regulatory takings claims under the Fifth Amendment?

STATEMENT PURSUANT TO RULE 29.6

Petitioner Machipongo Land and Coal Co., Inc. states that it has no corporate parents and that it has no publicly-traded stock.

TABLE OF CONTENTS

	Page
Questions Presented	i
Statement Pursuant to Rule 29.6	iii
Table of Contents	iv
Table of Cited Authorities	vi
Table of Appendices	xi
Petition for Writ of Certiorari	1
Opinions Below	1
Statement of Jurisdiction	1
Constitutional Provisions at Issue	1
Statement of the Case	2
A. Factual Background	3
B. Judicial Proceedings	5
Reasons for Granting the Writ	9
I. The Proper Denominator In The Takings Fraction From A Vertical Perspective Is The Coal Estate Where A Regulation Prohibits All Mining Of Coal In A 555 Acre Tract And The State's Property Law Recognizes The Coal Estate As A Separate And Unique Interest In Land.	10

Contents

	Page
A. The Issue And The Conflict	12
B. The Appropriateness Of Resolving The Issue Here	19
II. The Proper Denominator In The Takings Fraction From A Horizontal Perspective Is The Coal Estate In The Regulated Parcel Where It Has Independent Economic Viability As It Can Be Mined Profitably As A Separate And Independent Unit.	19
III. A State May Not Avoid The Payment Of Just Compensation For A Regulatory Taking Resulting From The Adoption Of A Regulation That Prohibits The Mining Of Coal, Based Upon Purported Background Principles Of Its Nuisance Law, Where The State Has Permitted Others To Mine Coal In The Same Area Both Before And After The Adoption Of The Regulation	25
IV. Where There Was No Intermediate Appellate Court, The Lower Court Should Have Used The Standard Of Review Set Forth In *Easley v. Cromartie* To Evaluate The Trial Court's Factual Findings In Its Dismissal Of A Regulatory Takings Claim Under The Fifth Amendment	27
Conclusion	30

TABLE OF CITED AUTHORITIES

Page

FEDERAL CASES

Andrus v. Allard, 444 U.S. 51, 100 S. Ct. 318, 62 L. Ed. 2d 210 (1979) 18

Armstrong v. United States, 364 U.S. 40, 80 S. Ct. 1563, 4 L. Ed. 2d 1554 (1960) 20

ASARCO Inc. v. Kadish, 490 U.S. 605, 109 S. Ct. 2037, 104 L. Ed. 2d 696 (1989) 7

Board of Regents of State Colleges v. Roth, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972) ... 12

Bush v. Gore, 531 U.S. 98, 121 S. Ct. 525, 148 L. Ed. 2d 388 (2000) 16

Cox Broad. Corp. v. Cohn, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975) 6

District Intown Properties Ltd. P'ship v. District of Columbia, 198 F.3d 874 (D.C. Cir. 1999) 8

Easely v. Cromartie, 532 U.S. 234, 121 S. Ct. 1452, 149 L. Ed. 2d 430, *rehearing denied*, 532 U.S. 1076, 121 S. Ct. 2239, 150 L. Ed. 2d 228 (2001) ..... ii, 9, 27, 28, 29, 30

Florida Rock Indus., Inc. v. United States, 791 F.2d 893 (Fed. Cir. 1986) *cert. denied*, 479 U.S. 1053, 107 S. Ct. 926, 93 L. Ed. 2d 978 (1997) 8

Cited Authorities

Page

Johnson v. Muelberger, 340 U.S. 581, 71 S. Ct. 474, 95 L. Ed. 552 (1951) 6

Keystone Bituminous Coal Ass'n. v. DeBenedictis, 480 U.S. 470, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987) ..... *passim*

Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994) 8

Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992) ..... *passim*

Palazzolo v. Rhode Island, 533 U.S. 606, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001) 10, 11, 20, 24, 26

Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978) ..... *passim*

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922) 11, 14, 17

Plymouth Coal Co. v. Commonwealth of Pennsylvania, 232 U.S. 531, 34 S. Ct. 359, 58 L. Ed 713 (1914) 11, 14, 15

Ruckelshaus v. Monsanto Co., 467 U.S. 986, 104 S. Ct. 2862, 81 L. Ed. 2d 815 (1984) 12, 16

Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002) 10, 11, 20

Page

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 101 S. Ct. 446, 66 L. Ed. 2d 358 (1980) 12, 16, 17

Whitney Benefits, Inc. v. United States, 926 F.2d 1169 (Fed. Cir.), *cert. denied*, 502 U.S. 952, 112 S. Ct. 406, 116 L. Ed. 2d 354 (1991) 12, 15, 16, 19, 26

STATE CASES

Bannard v. New York State Natural Gas Corp., 448 Pa. 239, 293 A.2d 41 (1972) 17

Chartiers Block Coal Co. v. Mellon, 152 Pa. 286, 25 A. 597 (1893) 17

Commonwealth ex. rel. Keator v. Clearview Coal Co., 256 Pa. 328, 100 A. 820 (1917) 17

Delaware & Hudson Canal Co. v. Hughes, 183 Pa. 66, 38 A. 568 (1897) 17

Machipongo Land & Coal Co. v. Commonwealth, 799 A.2d 751 (Pa. 2002) ..... *passim*

Machipongo Land & Coal Co. v. Commonwealth, 719 A.2d 19 (Pa. Cmwlth. 1998) 1, 22, 28, 29

Machipongo Land & Coal Co. v. Commonwealth, 544 Pa. 271, 676 A.2d 199 (1996) 6-7

McClimans v. Board of Supervisors of Shanango Township, 107 Pa. Cmwlth. 542, 529 A.2d 562 (1987) 18

Cited Authorities

Page

Miller & Son Paving, Inc. v. Plumstead Township, 552 Pa. 652, 717 A.2d 483 (1998) 17-18

Smith v. Glen Alden Coal Co., 347 Pa. 290, 32 A.2d 227 (1943) 17

UNITED STATES CONSTITUTION

U.S. Const. Amend. V ..... *passim*

U.S. Const. Amend. XIV, § 1 ..... 1, 2

FEDERAL STATUTE

28 U.S.C. § 1257 ..... 1, 6

STATE STATUTE

52 P.S. § 1396 5

STATE REGULATION

25 Pa. Code § 86.130(b)(14) 3, 5

Page

OTHER AUTHORITIES

Richard A. Epstein, *Takings: Descent and Resurrection*, 1987 Sup.Ct. Rev. 1 (1987) 24

John E. Fee, *Unearthing the Demoninator in Regulatory Takings Claims*, 61 U. Chi. L.Rev. 1535 (1994) 22, 24

Frank I. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165 (1967) 16, 21-22, 24

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The Supreme Court Of Pennsylvania, Middle District, Decided May 30, 2002 ..... 1a

Appendix B — Notice Of The Commonwealth Court Of Pennsylvania Dated October 19, 2000 ..... 52a

Appendix C — Order Of The Commonwealth Court Of Pennsylvania Dated September 25, 2000 .... 53a

Appendix D — Adjudication And Decree Nisi And Order Of The Commonwealth Court Of Pennsylvania Dated August 21, 2000 ..... 55a

Appendix E — Order Of The Commonwealth Court Of Pennsylvania Denying Motion In Limine Dated December 28, 1999 ..... 98a

Appendix F — Memorandum Opinion And Order Of The Commonwealth Court Of Pennsylvania Dated And Filed October 28, 1999 ..... 99a

Appendix G — Opinion And Order And Dissenting Opinion Of The Commonwealth Court Of Pennsylvania Dated And Filed September 30, 1998 ..... 109a

Appendix H — Relevant Regulation 142a

Map 144a

PETITION FOR WRIT OF CERTIORARI

Machipongo Land and Coal Co., Inc., Victor E. Erickson Trust and Joseph Naughton respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Pennsylvania.

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania is reported at 799 A.2d 751 (Pa. 2002); it appears at Appendix A to the petition. Petitioners' Appendix (Pet. App.) 1a – 51a. Except as noted below, the opinions and rulings of the trial court (Pennsylvania Commonwealth Court) were not published. The entry of judgment in the Commonwealth Court, appears at Appendix B. Pet. App. 52a. A revision to the Commonwealth Court's Adjudication and Decree Nisi, appears at Appendix C. Pet. App. 53a – 54a. The Commonwealth Court's Adjudication and Decree Nisi, is at Appendix D. Pet. App. 55a – 97a. The Commonwealth Court's order denying a motion in limine is at Appendix E. Pet. App. 98a. The Commonwealth Court's memorandum opinion regarding nuisance is at Appendix F. Pet. App. 99a – 108a. Commonwealth Court's opinion and order regarding summary judgment is reported at 719 A.2d 19 (Pa. Cmwlth. 1998) and appears at Appendix G. Pet. App. 109a – 141a.

STATEMENT OF JURISDICTION

The judgment of the Pennsylvania Supreme Court was entered on May 30, 2002. Pet. App. 51a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part: "nor shall private property be taken for public use, without just compensation." U.S. Const. Amend. V.

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any State

deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1.

STATEMENT OF THE CASE

Since as early as 1915, Petitioners Machipongo Land and Coal Co., Inc., the Victor E. Erickson Trust and Joseph Naughton (collectively, Petitioners or the Coal Owners) have owned land in Clearfield County, Pennsylvania, for the express purpose of mining their coal estates. In 1992, the Commonwealth of Pennsylvania, Department of Environmental Resources (Commonwealth of Pennsylvania or DER), Environmental Quality Board (EQB), and Arthur A. Davis, Secretary of Environmental Resources (Secretary Davis) purportedly to protect a small stream, promulgated a regulation that declared all land within a 555 acre area as "unsuitable for mining." Under the regulation, the Coal Owners cannot surface mine any of their coal within the regulated area, nor can they deep mine the coal as it is not accessible except from within the regulated area. The effect of the regulation is to completely deprive the Petitioners of the value of their coal estates in the 555 acre area. The Coal Owners filed this regulatory takings action against the Commonwealth, the EQB and Secretary Davis in the Commonwealth Court of Pennsylvania alleging that the Respondents' actions effected a compensable taking of their property for public use within the meaning of the Fifth Amendment to the United States Constitution. A trial was held to determine the effect of this regulation on Petitioners' coal estates. After trial, the Pennsylvania Commonwealth Court determined that the regulation effected a taking of Petitioners' coal estates and overturned the regulation because it violated the Fifth Amendment to the Constitution. Following an appeal, the Pennsylvania Supreme Court reversed and remanded. The Petitioners now seek relief from this Court for the federal constitutional errors committed by the court below.

A. Factual Background

On May 23, 1992, Respondent the EQB, in coordination with Respondents DER and Secretary Davis, promulgated a regulation, 25 Pa. Code § 86.130(b)(14) (the Regulation). Pet. App. 142a – 143a. The Regulation designated 555 acres of the Goss Run watershed, located in Woodward Township, Clearfield County, Pennsylvania, as "Unsuitable for Mining" (UFM). Excepted from the Regulation's designation were two pre-existing surface coal mines located within the Goss Run watershed (the regulated area is referred to as the Goss Run UFM Area). *Id.* Goss Run is a narrow stream, 0.9 miles in length and barely a foot or two wide in places. R. 260a. Goss Run discharges into the Brisbin Dam, a 2.5 acre man-made impoundment located at the southern border of the Goss Run UFM Area. *Id.* At least ten abandoned deep mine entries are located within the Goss Run UFM Area and, in fact, a significant portion of the water in Goss Run begins as mine discharges from many of these abandoned mines. R. 260a-261a. The Goss Run UFM Area is surrounded on three sides – west, north and east – by existing surface mines. *See* Map, Pet. App. 144a. Two of those surface mines, the Cowfer and Bonita mines, are actually located *within* the Goss Run Watershed. The effect of the Regulation was to prohibit the removal of *any* coal within the area delineated by the Regulation. .

Petitioner Machipongo owns approximately 373 acres of coal estate, as well as the surface estate, within in the UFM Area. R. 260a. Outside the UFM Area, Machipongo also owns 200 acres in fee simple (i.e. the surface estate and the coal estate) and over 1000 acres of coal estate in tracts thoughout Clearfield County. R. 260a, 405a, 413a. Erickson/Naughton own approximately 52 acres of coal estate within the UFM Area. R. 260a, 265a. Outside the UFM Area, Erickson/Naughton also own approximately 1150 acres in fee simple (i.e. the surface estate and coal estate) and 250 acres of the coal estate in Clearfield County. R. 260a, 405a, 413a. There was no evidence in the record that these lands comprised single parcels.

The Commonwealth Respondents have stipulated that "[t]he right to mine the coal is a property right that inheres in [the Coal Owners'] title subject to obtaining a permit from the Department [of Environmental Resources]." R. 259a.

Machipongo acquired its property as early as 1915. R. 1037a. In 1999, the Commonwealth Respondents also stipulated that Machipongo had owned its property for approximately 46 years; Naughton had owned his interest in the property for approximately 55 years; and, Victor E. Erickson owned his interest in the property for approximately 43 years, until 1984 when the interest was transferred to the Victor E. Erickson Trust. R. 263a. Further, the Commonwealth stipulated that the Victor E. Erickson Trust owned its interest at the time of the promulgation of the Regulation. *Id.* (The Erickson Family Trust owns the rights to 4/5 of the coal estates; Mr. Naughton owns 1/5 of the same coal estates; together they own the entire Erickson/Naughton estate.) R. 260a, 265a. The Petitioners have testified that they held the land "strictly for coal production." R. 1037a, 1049a-1050a.

Although the designation prohibits the removal of *any* coal with the UFM Area, the Coal Owners have only claimed coal that was mineable, permittable and located outside of any statutory buffer zone. R. 623a-624a; *see also* R. 406a-411a. At trial, the Coal Owners presented evidence that the following coal was taken by virtue of the Regulation:

Reserves	**Tons of Coal**	**Record Reference**
Machipongo Surface	355,800 tons	R. 665a
Machipongo Underground	1,287,300 tons	R. 1007a
Erickson/Naughton Surface	359,100 tons	R. 663a

B. Judicial Proceedings

On April 3, 1989, the Brisbin Recreational Board and the Locust Grove Sportsmen Club filed a petition with DER seeking to have a certain area of Woodward and Decatur Townships, Clearfield County, declared UFM under the authority of Section 4.5(b) of the Surface Mining Conservation and Reclamation Act ("PaSMCRA"), Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. § 1396.4e(b). R. 257a. After DER conducted its study, DER recommended to the EQB that the Goss Run Watershed be designated as UFM. This was a smaller area than that which was originally requested for designation as UFM in the petition. R. 258a-259a. On May 23, 1992, the EQB published notice, 22 Pa. Bull. 2719 (May 23, 1992) and the designation was finally effectuated by an amendment to the Regulation set forth in 25 Pa. Code § 86.130(b)(14). *See* Pet. App. 142a-143a.

As a result of the regulatory taking of their property, the Coal Owners filed a timely Complaint (called a Petition for Review) to the Pennsylvania Commonwealth Court (the trial court) alleging that they suffered a compensable taking of their property. *See* Amended Petition for Review, ¶ 29 ("That Section 8 of [PaSMCRA] violates the Pennsylvania and United States Constitutions in that it does not provide for just compensation for land owners whose coal reserves are taken as a result of a designation of an area as unsuitable for mining.") and ¶ 30 ("That the regulations adopted to implement Section 8 are, or have become by application . . . contrary to the . . . constitutions of the United States and Pennsylvania.").

From 1992 through 1999, the Coal Owners and Respondents engaged in extensive preliminary litigation in the courts of Pennsylvania. Finally, on August 21, 2000, following a trial, the Commonwealth Court issued an Adjudication and Decree Nisi which invalidated 25 Pa. Code § 86.130(b)(14) as applied to the proposed Erickson/Naughton surface mine and the proposed Machipongo underground mine, but not as applied to the proposed Machipongo surface mine. Pet. App. 95a.

In rendering its decision, the Commonwealth Court found that the Erickson/Naughton surface reserves and the Machipongo underground reserves were economically viable as stand-alone mines and struck the Regulation as applied to those mines. Pet. App. 79a-80a, 93a, 95a. Despite clear evidence to the contrary, the court, however, found that the Machipongo surface reserves were insufficient in quantity to sustain mining. Pet. App. 80a. The court then stated that any damages for a temporary taking would be recoverable "through the normal eminent domain process." Pet. App. 96a. Following post-trial motions, *see* Pet. App. 53a – 54a, final judgment was entered October 19, 2000. Pet. App. 52a.

On May 30, 2002, the Pennsylvania Supreme Court (lower court) largely reversed the Commonwealth Court and remanded the case for an additional trial consistent with the tests established by the Pennsylvania Supreme Court. Pet. App. 1a - 51a; 799 A.2d 751 (2000).[1]

1. This Court has appellate jurisdiction under 28 U.S.C. § 1257. The Pennsylvania Supreme Court has interpreted the decisions of this Court and issued a final determination establishing tests for determining the relevant parcel for the purposes of a Fifth Amendment takings analysis. Even though further proceedings are contemplated, the decision is a final determination within the meaning of section 1257 because all federal legal questions have been conclusively decided and cannot be affected by the further state court proceedings. *See ASARCO Inc. v. Kadish*, 490 U.S. 605, 109 S. Ct. 2037, 104 L. Ed. 2d 696 (1989); *see also Johnson v. Muelberger*, 340 U.S. 581, 71 S. Ct. 474, 95 L. Ed. 552 (1951). Regardless of the outcome of the state court's future determinations on the factual issues, the federal issues already and finally decided by the Pennsylvania Supreme Court "will survive and require decision." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 480, 95 S. Ct. 1029, 1038, 43 L. Ed. 2d 328 (1975). We are aware that this Court has previously stated that eminent domain proceedings are not final unless the state judgment addresses both a taking and the payment of just compensation. *Id.* at 479 n.6, 95 S. Ct. at 1038 n.6. However, in this case, the Pennsylvania Supreme Court specifically ruled that its jurisdiction was based on the state's *police power* and not the power of eminent domain. *Machipongo Land & Coal Co. v. Commonwealth*, 544

(Cont'd)

The Pennsylvania Supreme Court acknowledged the two tests used to assess regulatory takings claims — i.e. the categorical takings analysis of *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992) and the partial takings analysis of *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978). It noted that under either test, identifying the relevant parcel was the critical threshold issue. Pet. App. 28a; 799 A.2d at 765.

The Commonwealth Court, relying on over 100 years of Pennsylvania common law and precedent, recognized that the coal estate is a separate and unique estate in land and found that estate to be the relevant parcel from a vertical perspective. The Pennsylvania Supreme Court, however, held that this Court had abolished Pennsylvania's separate recognition of estates in *Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 480 U.S. 470, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987). Thus, even though the Coal Owners were only claiming a loss as to their coal estates, the Pennsylvania Supreme Court ignored its background principles of Pennsylvania law and based upon *DeBenedictis* ruled that "in this case, the relevant parcel cannot be vertically segmented and must be defined to include both the surface and mineral rights." Pet. App. 34a; 799 A.2d at 768.

Next, the Pennsylvania Supreme Court addressed the relevant parcel from a horizontal perspective and rejected the approach of the Commonwealth Court and the Coal Owners (that had defined the relevant parcel as the coal estate in the regulated area) as "overly restrictive" and the approach of the Commonwealth (that had suggested that the relevant parcel be defined as *all* of the Coal Owners' property in Clearfield County) as "overly inclusive." *Id.* Instead, the Pennsylvania Supreme

---

(Cont'd)
Pa. 271, 276, 676 A.2d 199, 202 (1996). Moreover, the lower court has refused to consider the remedy for just compensation, relegating the Petitioners to bringing a separate and new action for any such damages. *See* Pet. App. 51a; 799 A.2d at 775-76.

Court adopted a third approach, a so-called "flexible approach, designed to account for factual nuances," consisting of several factors favored by the Courts of Appeals for the Federal and D.C. Circuits. Pet. App. 35a; 799 A.2d at 768-69 (citing *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994); *Florida Rock Indus., Inc. v. United States*, 791 F.2d 893 (Fed. Cir. 1986) *cert. denied*, 479 U.S. 1053, 107 S. Ct. 926, 93 L. Ed. 2d 978 (1997); *District Intown Properties Ltd. P'ship v. District of Columbia*, 198 F.3d 874 (D.C. Cir. 1999)). Because all of the newly-identified factors were not addressed in the current record, the case was remanded to the Commonwealth Court for it to "identify[] the appropriate horizontal conceptualization of the property to use [as the denominator in the takings fraction] in both the *Lucas* and *Penn Central* analyses." Pet. App. 35a; 799 A.2d at 769.

After addressing the denominator issue, the Pennsylvania Supreme Court determined that, notwithstanding its decision to remand the issue of the horizontal parcel, it could perform the *Lucas* and *Penn Central* analyses for the property. Ultimately, the court remanded to the Commonwealth Court for additional findings. Pet. App. 37a-41a, 50a; 799 A.2d at 770-71, 775.

In *Lucas*, this Court held that where a categorical taking has occurred, the government's only defense to the payment of just compensation is that the land use prohibited by the regulation was also prohibited by the state's law of property and nuisance. 505 U.S. at 1027-1030, 112 S. Ct. at 2899-2901. In its unpublished opinion on the nuisance issue, the Commonwealth Court refused to allow DER preemptively to prevent mining through a regulation based on allegations of prospective harm, reasoning that DER could have prevented harm to the watershed by denying the Coal Owners a mining permit had DER found their activity would adversely impact the area. Pet. App. 106a-107a. The Pennsylvania Supreme Court refocused the inquiry, acknowledging that "although mining is not a nuisance *per se*, pollution of public waterways is . . . [and] experts need not wait until acid mine water flows out of mines

in the UFM area to predict the likely results of mining this land." Pet. App. 49a; 799 A.2d at 775. It ignored the record that the area was being mined by others both before and after the adoption of the Regulation and that the Petitioners' experts had concluded the mining could be conducted without any adverse impact on Goss Run (which was not contradicted by the Commonwealth).

Finally, the Pennsylvania Supreme Court did not review the factual determinations of the trial court (Commonwealth Court) and, therefore, also employed the wrong standard of review in this regulatory takings case. *See Easely v. Cromartie*, 532 U.S. 234, 121 S. Ct. 1452, 149 L. Ed. 2d 430, *rehearing denied*, 532 U.S. 1076, 121 S. Ct. 2239, 150 L. Ed. 2d 228 (2001). Without any analysis, the Pennsylvania Supreme Court adopted the legal reasoning of the trial court and did not further inquire into the facts. Pet. App. 50-51a; 799 A.2d at 775. This determination of the Pennsylvania Supreme Court is in direct opposition to this Court's determination in *Easely.*

As a result of these rulings by the Pennsylvania Supreme Court, the Coal Owners' have been deprived of the right to have the confiscation of their coal estates evaluated under the categorical taking test. *Lucas*, *supra*. Furthermore, the Pennsylvania Supreme Court's interpretation of the "background principles of state law" defense turns that defense on its head, allowing a state to avoid paying just compensation on the basis of *ex post facto* "background principles."

The Coal Owners timely file this Petition for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

The court below issued decisions that are in conflict with the decisions of this Court or other lower courts on three important questions for regulatory takings law. Furthermore, the court below employed the improper standard of review in a regulatory takings claim. All of those conflicts or errors warrant resolution by this Court.

I. THE PROPER DENOMINATOR IN THE TAKINGS FRACTION FROM A VERTICAL PERSPECTIVE IS THE COAL ESTATE WHERE A REGULATION PROHIBITS ALL MINING OF COAL IN A 555 ACRE TRACT AND THE STATE'S PROPERTY LAW RECOGNIZES THE COAL ESTATE AS A SEPARATE AND UNIQUE INTEREST IN LAND.

A significant open and unresolved issue of nationwide significance remains following this Court's numerous determinations on regulatory takings. That is the question of the extent of the owner's property to be considered when conducting the takings analysis. The characterization of the relevant parcel has been referred as the "denominator" issue or sometimes the "parcel as a whole" issue. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, __ U.S. __, 122 S. Ct. 1465, 1469, 152 L. Ed. 2d 517 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606, 631, 121 S. Ct. 2448, 2465, 150 L. Ed. 2d 592 (2001); *Lucas*, 505 U.S. at 1016 n.7, 112 S. Ct. at 2894 n.7; *DeBenedictis*, 480 U.S. at 497, 107 S. Ct. at 1248; *Penn Central*, 438 U.S. at 130-31, 98 S. Ct. at 2662.

Recently, the Court has referred to this as the "difficult, persisting question of what is the proper denominator in the takings fraction." *Palazzolo*, 533 U.S. at 631, 121 S. Ct. at 2465. In *Palazzolo*, this Court noted that the issue is not settled:

> Some of our cases indicate that the extent of deprivation effected by a regulatory action is measured against the value of the parcel as a whole, *see, e.g., Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 480 U.S. 470, 497, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987); but we have at times expressed discomfort with the logic of this rule, *see Lucas, supra*, at 1016-1017, n.7, 112 S. Ct. 2886, a sentiment echoed by some commentators, *see, e.g.*, Epstein, Takings: Descent and Resurrection, 1987

Sup.Ct. Rev. 1, 16-17 (1987); Fee, Unearthing the Denominator in Regulatory Takings Claims, 61 U. Chi. L.Rev. 1535 (1994).

Id. at 631, 121 S. Ct. at 2465.[2] Despite a number of cases in which the parcel is a factor, the important, nationally significant question of how the Court and litigants should define the relevant "parcel" remains unanswered.

The attempts to define the relevant parcel, or the proper denominator in the takings fraction, has been confusing because a relevant parcel can be viewed from different perspectives: the horizontal parcel which refers to the land area to be considered, the vertical parcel which refers to the property interest (the so-called "bundle of rights") to be considered, and as discussed by *Tahoe-Sierra*, the temporal parcel which is the time limit on enjoyment of the property interest. The considerations as to each perspective are different and while fairness and justice should be the basis for any analysis to determine the parcel from each perspective, attempts to develop a common rationale that applies to all the different perspectives have produced confusing and conflicting results. For this reason the analysis as to each perspective should be conducted separately.

In *Machipongo*, the Pennsylvania Supreme Court attempted to predict this Court's answer as to the relevant parcel from a vertical perspective, however, the court was mistaken in its analysis. That court misinterpreted this Court's rulings in no less than the following cases: *Tahoe-Sierra*, *supra*; *Palazzolo*, *supra*; *Lucas*, *supra*; *DeBenedictis*, *supra*; *Penn Central*, *supra*; *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922); *Plymouth Coal Co. v. Commonwealth of Pennsylvania*, 232 U.S. 531, 34 S. Ct. 359, 58 L. Ed 713 (1914).

---

2. In *Tahoe-Sierra*, a case involving the denominator from a temporal perspective only, this Court identified the parcel question as the "starting point for the court's analysis." 122 S. Ct. at 1483.

The Pennsylvania Supreme Court is also at odds with at least one circuit court: *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169 (Fed. Cir.), *cert. denied*, 502 U.S. 952, 112 S. Ct. 406, 116 L. Ed. 2d 354 (1991). Because the Pennsylvania court's decision cannot be reconciled with the determinations of this Court or the Federal Circuit and because the Pennsylvania Supreme Court seeks to deny the Coal Owners an important federal right, this Court should intervene and review the determination of the Pennsylvania Supreme Court.

A. The Issue and the Conflict

The sweep of the law of regulatory takings makes it evident that a court must evaluate a case in which a Pennsylvania coal estate has been taken solely on the basis of the coal estate. Takings claims are and should be evaluated only by reference to the property interest impacted as defined by state law. Reliance on state property law is necessitated by the fact that "'[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. . . .'" *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161, 101 S. Ct. 446, 451, 66 L. Ed. 2d 358 (1980) (quoting *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709, 33 L. Ed. 2d 548 (1972)). Indeed, this Court has rejected the claim that the Supremacy Clause allowed Congress to dictate that the effect of its regulation "not vary depending on the property law of the State in which the submitter [of trade-secret information] is located . . . If Congress can 'pre-empt' state property law in the manner advocated . . . , then the Taking Clause has lost all vitality." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1012, 104 S. Ct. 2862, 2878, 81 L. Ed. 2d 815 (1984).

In *Lucas*, this Court described the import of state law in defining the property interest to be analyzed for purposes of the takings analysis:

> Regrettably, the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured. . . . *The answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property — i.e., whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value.*

505 U.S. at 1016 n.7, 112 S. Ct. at 2894 n.7 (emphasis added).

In this context, the Pennsylvania Supreme Court misinterpreted this Court's ruling in *DeBenedictis* as "ha[ving] expressly rejected Pennsylvania's division of estates within a single parcel of land for the purposes of takings analysis. *Keystone*, 480 U.S. at 479-480, 500, 107 S. Ct. 1232 (citing *Andrus*)." Pet. App. 30a; 799 A.2d at 766.[3] In fact, this Court did not reject the division of estates represented by Pennsylvania property law but concluded that one of the estates (the support estate) was an adjunct to either the surface estate or the coal estate:

> In rejecting the [petitioners'] argument that the support estate had been entirely destroyed, the Court of Appeals did not rely on the fact that the support estate itself constitutes a bundle of many rights, but rather considered the support estate as just one

3. The lower court held:

> However, [the United States Supreme Court] has refused to allow: vertical severance of the mineral estate in *Keystone*. . . . Thus, in this case, the relevant parcel cannot be vertically segmented and must be defined to include both the surface and mineral rights.

Pet. App. 34a, 799 A.2d at 768. Simply stated, this Court has never so ruled.

> segment of a larger bundle of rights that invariably includes either the surface estate or the mineral estate.

DeBenedictis, 480 U.S. at 480, 107 S. Ct. at 1239.

Nowhere in *DeBenedictis* has this Court rejected Pennsylvania's coal estate as a viable, independent estate in land for purposes of the takings analysis. The lower court has misread this Court's ruling in *DeBenedictis*. The effect is to eviscerate Pennsylvania property law and to establish misguided precedent that other courts may follow in ruling on regulatory takings cases.

The Pennsylvania Supreme Court also misreads this Court's ruling in an early — pre-*Mahon* — decision, *Plymouth Coal*. In *Plymouth Coal*, the Pennsylvania Supreme Court ruled that a state law that required coal to be left in place between two mines did not constitute a taking of the coal. 232 U.S. at 547, 34 S. Ct. at 364. This Court affirmed. *Id.* As Justice Holmes explained a few years later in *Mahon*, the requirement in *Plymouth Coal Co.* of leaving the coal barrier in the ground did not constitute a taking because leaving the coal barrier provided for:

> the safety of the employees of either mine in case the other should be abandoned and allowed to fill with water. *But that was a requirement for the safety of employees invited into the mine, and secured an average reciprocity of advantage that has been recognized as a justification of various laws.*

Mahon, 260 U.S. at 415, 43 S. Ct. at 160 (emphasis added). This language was echoed in *Lucas*. 505 U.S. at 1018, 112 S. Ct. at 2894.

Clearly, the Supreme Court understood the rule of *Plymouth Coal* as applying only in takings cases where there is an "average reciprocity of advantage." *See Lucas*, 505 U.S. at 1017-18, 112 S. Ct. at 2894. Here, the Coal Owners' coal has been taken with no reciprocal advantage having been provided. As a result, the Commonwealth of Pennsylvania has obtained the equivalent

of a state park without having to pay for it. Unlike the Supreme Court, however, the lower court has misconstrued *Plymouth Coal* as standing for the unsupportable dichotomy that since "[t]he coal itself is not taken" all that is lost is the *use*, rather than *ownership*. Pet. App. 23a-24a; 799 A.2d at 763. The lower court has misinterpreted *Plymouth Coal* by ruling that this important precedent justified the Respondents' actions.

In attempting to draw an analogy between Pennsylvania's law regarding surface rights and mineral rights, on the one hand and New York's law regarding surface rights and air rights on the other, the Pennsylvania Supreme Court relied improperly on this Court's rule in *Penn Central* that, "'Taking' jurisprudence does not divide a single property into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." Pet. App. 31a; 799 A.2d at 767 (quoting *Penn Central*, 438 U.S. at 130, 98 S. Ct. at 2662). The problem with the lower court's inapt analogy is that New York does not recognize a separate "air" estate, whereas Pennsylvania has a long history of recognizing a separate coal estate. *See infra* at 16-19.

Additionally, the lower court's holding in *Machipongo* is at odds with another lower court. In *Whitney Benefits*, a pre-*Lucas* case involving a federally designated UFM area, the Claims Court and the Court of Appeals for the Federal Circuit evaluated the claim solely in terms of the coal estate taken because the state in which the claim arose (Wyoming) recognized separate estates in the minerals and the surface. 926 F.2d at 1174. As the Federal Circuit explained, the destruction of the coal estate is the equivalent of the loss of the entire value of that estate:

> [As] the Claims Court correctly found, the *only* property here involved is the right to surface mine a particular deposit of coal. The only possible use of that right is to surface mine that coal. When Congress prohibited that mining of that coal, it did not merely regulate, it took, all the property involved in this case.

Id. at 1172 (emphasis in original). The Federal Circuit, in analyzing the takings claim specified that when dealing with a coal estate recognized by the state as a separate estate in land, the court should examine the impact of the regulation only on the coal estate and not on the surface estate also owned by the claimants. *Id.* at 1174.[4]

As this Court has required in *Webb's Fabulous Pharmacies* and *Ruckelshaus*, a *determinative* issue in this case is Pennsylvania's law of property as it relates to coal estates. Indeed, Pennsylvania property law ought to control, since property rights are created by the states, not the Federal Constitution.[5] *See Webb's Fabulous Pharmacies*, 449 U.S. at

---

4. The focus of the court in *Whitney Benefits* is more consistent with the investment backed expectations of these Petitioners and is the fairest relevant parcel under such circumstances. Further support is found in Professor Michelman's seminal article on takings:

> Inasmuch as mining rights are well recognized, divisible interests in land, and inasmuch as 'rights' to particular surface uses have come to be recognized as species of 'property' under the label of 'easement' or 'servitude,' why not say that any land consists of two 'things' — mining rights and surface rights, or foundry rights and residue — and that the relevant denominator in testing a regulation which impinges only on mining rights or foundry rights is the value of those rights — which the regulation totally destroys? Why, in other words should a regulation's own scope sometimes define the geographical, but not the functional, extent of the 'thing' said to be regulated?

Frank I. Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1193 (1967).

5. Indeed, this Court has recently cautioned that it will closely monitor the states in their application of federal constitutional rights. *Bush v. Gore*, 531 U.S. 98, 115 n.1, 121 S. Ct. 525, 535 n.1, 148 L. Ed. 2d 388 n.1 (2000) (Rehnquist, J., concurring) (citing *Lucas*, 505 U.S. 1003, 112 S. Ct. 2886); *Id.*, 531 U.S. at 138 n.1, 121 S. Ct. at 547 n.1 (Ginsburg, J., dissenting) (citing *Lucas*, 505 U.S. at 1032 n.18, 112 S. Ct. at 2902 n.18).

161, 101 U.S. at 451. The Pennsylvania Supreme Court has recognized, that the coal estate under Pennsylvania law is *in and of itself* a separate estate in real property. *Smith v. Glen Alden Coal Co.*, 347 Pa. 290, 304, 32 A.2d 227, 234-35 (1943); *Commonwealth ex. rel. Keator v. Clearview Coal Co.*, 256 Pa. 328, 331, 100 A. 820 (1917). The separateness of the coal estate in land has been recognized for many years in Pennsylvania. *See Glen Alden Coal Co.*, 347 Pa. at 304, 32 A.2d at 234-35 ("one person may own the coal, another the surface, and the third the right of support"). The coal estate may be, and is, taxed separately. *Bannard v. New York State Natural Gas Corp.*, 448 Pa. 239, 254, 293 A.2d 41, 50 (1972). A deed may convey an estate in fee simple in the coal. *Delaware & Hudson Canal Co. v. Hughes*, 183 Pa. 66, 69, 38 A. 568, 569 (1897).

The Pennsylvania Supreme Court has ruled that, unlike a surface estate, there is no divisibility or segmentation of a coal estate. *See Chartiers Block Coal Co. v. Mellon*, 152 Pa. 286, 296, 25 A. 597, 599 (1893) ("The grantee of the coal owns the coal, but nothing else, save the right of access to it, and the right to take it away.") This uniqueness was recognized by this Court in *Mahon*:

> [The Kohler Act] purports to abolish what is recognized in Pennsylvania as an estate in land — a very valuable estate [the coal estate] — and what is declared by the Court below to be a contract hitherto binding the plaintiffs. If we were called upon to deal with the plaintiffs' position alone we should think it clear that the statute does not disclose a public interest sufficient to warrant so extensive a destruction of the defendant's constitutionally protected rights.

260 U.S. at 414, 43 S. Ct. at 159.

The result-oriented determination of the lower court is further evidenced by language found in a recent decision of that court that *supports* the Coal Owners' position with respect to a taking of the coal estate. *See Miller & Son Paving, Inc. v.*

Plumstead Township, 552 Pa. 652, 717 A.2d 483 (1998). *Miller & Son* determined that there was no taking of the plaintiff's *non-coal* quarry as a result of the defendant township's zoning ordinance restricting quarrying activity.[6] In doing so, however, the court acknowledged with approval a determination in the case of *McClimans v. Board of Supervisors of Shanango Township*, 107 Pa. Cmwlth. 542, 529 A.2d 562 (1987), in which an ordinance that prevented coal mining was held to constitute a taking of the coal owner's property. The Pennsylvania Supreme Court noted that the ordinance in *McClimans* "precluded the single use the property possessed." *Miller*, 552 Pa. at 658 n.7, 717 A.2d at 487 n.7. What was that single use? It was the right to mine the coal *even though the owners owned both the surface and the coal. See McClimans*, 107 Pa. Cmwlth. at 556 n.4, 529 A.2d at 569 n.4.

Over 100 years of Pennsylvania Supreme Court precedent has firmly established that the coal estate is to be treated as a separate estate in land; it is but a single strand — the right to mine. *This* is the background principle of state law in Pennsylvania that determines the denominator for the takings fraction in this case. *Unlike the air rights in Penn Central, which were not recognized as a separate estate under the relevant state law, the coal estate in Pennsylvania property law does enjoy that status.* From the relevant perspective — that of the property owner — the interest in the coal estate has been destroyed by the UFM designation every bit as much as if the Commonwealth had mined the coal for its own use and hauled it away. The Regulation, then, does not merely inhibit one strand in a bundle consisting of multiple strands, but destroys completely the one and only strand held.[7] The Coal Owners

---

6. Petitioners acknowledge that *non-coal* mineral estates are treated differently than *coal* estates in Pennsylvania.

7. *Cf. Andrus v. Allard*, 444 U.S. 51, 65-66, 100 S. Ct. 318, 327, 62 L. Ed. 2d 210 (1979) ("At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety.").

had a Constitutional right to rely on this bedrock principle of Pennsylvania law.

This Court should establish a principle, as suggested in *Penn Central*, *DeBenedictis*, and *Lucas*, that ***State property law determines the vertical component of the regulated parcel.*** Consequently, this Court should analyze the Coal Owners' vertical property rights only with respect to the coal estate.

B. The Appropriateness of Resolving the Issue Here

The Pennsylvania Supreme Court has misread and misinterpreted important Supreme Court cases that define the parameters of the denominator issue and has failed to predict the direction of this Court. The lower court is also in conflict with the Federal Circuit in *Whitney Benefits*.

Pennsylvania property law has shaped the reasonable investment backed expectations of the Petitioners. The selection of the denominator by the Pennsylvania Supreme Court that allows for the destruction of the coal estate, frustrates their legitimate constitutionally-based expectations. The lower court's effort to abolish the value of the coal estate is an example of the type of "newly decreed" ruling rejected by *Lucas*. 505 U.S. at 1029, 112 S. Ct. at 2900. The selection of a denominator should never result in such an unfair and unjust result. This Court should reject the newly-decreed denominator proposed by the Pennsylvania Supreme Court that would thwart the Fifth Amendment. This case merits immediate review and reversal by this Court.

II. THE PROPER DENOMINATOR IN THE TAKINGS FRACTION FROM A HORIZONTAL PERSPECTIVE IS THE COAL ESTATE IN THE REGULATED PARCEL WHERE IT HAS INDEPENDENT ECONOMIC VIABILITY AS IT CAN BE MINED PROFITABLY AS A SEPARATE AND INDEPENDENT UNIT.

Despite this Court's repeated admonitions that fairness and justice should guide the courts in making determinations regarding takings, the Pennsylvania Supreme Court has devised

a test for determining the relevant parcel from a horizontal perspective that is inherently *un*fair and *un*just. The test, which the lower court believed has been adopted by two other lower courts (the Federal Circuit and District of Columbia Circuit) should be reviewed by this Court and, ultimately, reversed.

Over four decades ago, this Court recognized that the Takings Clause was animated by the concepts of fairness and justice: "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49, 80 S. Ct. 1563, 1569, 4 L. Ed. 2d 1554 (1960) (extinguishment of lien constituted a taking which required compensation). As this Court has recently reiterated, "[t]he concepts of 'fairness and justice' . . . underlie the Takings Clause[]." *Tahoe-Sierra*, 122 S. Ct. at 1486 (quoting *Palazzolo*, 533 U.S. at 633, 121 S. Ct. at 2466 (O'Connor, J., concurring)). At the same time, the Court acknowledges that the notion of fairness and justice is "less than fully determinate." *Id.*

The analysis of the relevant parcel from a horizontal perspective must begin with the land area regulated. How else can the impact of the Regulation be analyzed? The record in this case established that all of Petitioners' proposed mines within the regulated area had independent economic significance, *i.e.* that each could have been mined independently of other coal reserves as profitable, stand alone mines. R. 697a-698a, 980a-981a, 1529a-1531a; *see also* Pet. App. 79a-80a, 93a. These considerations were part of the test of the Commonwealth Court to determine whether a discrete loss had occurred that warranted Fifth Amendment protection:

> [W]e believe the property interest by regulation approach is the best [test] to determine the denominator, but with some important modifications to take into consideration the need for governmental regulation in the public interest. Although this

approach tilts in the landowner's favor, 'historically the Takings Clause was designed to protect private citizens from governmental interference with property rights. Therefore, it makes sense for courts, at least initially, to tip the scales slightly in the plaintiff's favor.' However, while the regulated land would first be considered under this approach, to determine whether it actually would be the denominator would depend on the answers the courts received to the following questions:

- whether the regulated land had value prior to the regulation;
- whether the regulated land has a separate use from the non-regulated contiguous parcel(s) – *i.e.*, whether it may be profitably used if it is the only parcel; and
- if the regulated land has value separate from the contiguous land, whether all of its economic benefit is gone.

Pet. App. 128a-129a; 719 A.2d at 28 (footnotes omitted).

Professor Michelman stressed this issue:

> The difficulty is aggravated when the question is raised of how to define the 'particular thing' whose value is to furnish the denominator of the fraction. Let us suppose that I own a tract of unimproved land. Is the land necessarily one 'thing' for this purpose, or might it be several? Can it, for example, ever be regarded as geographically divided into more than one thing? Evidently, it can be; for, if we imagine government's practically forbidding me any use of a geographically determined quarter of my farm, it is not likely that the obligation to compensate can be escaped by the argument that only a quarter of the value of the 'thing' has been destroyed.

Michelman, 80 Harv. L. Rev. at 1192-93.[8] This analysis comports with reality. If land can be used profitably as units, and thus create investment backed expectations for such units, surely such units are entitled to Fifth Amendment protection.

However, the lower court rejected the trial court's test as to the denominator from a horizontal perspective by characterizing it as "overly restrictive" without any explanation for its characterization. Pet. App. 34a-35a; 799 A.2d 768. The lower court adopted what it called a "flexible approach, designed to account for factual nuances." *Id.* (citation omitted). It ignored the *implicit holdings* of *Penn Central* and *DeBenedictis* which were consistent with the Commonwealth Court's test.

In *Penn Central*, this Court started from the characterization of the regulated area by the New York Commission that the terminal and the city tax block it occupied was the "landmark site." *Penn Central*, 438 U.S. at 115-116, 98 S. Ct. at 2655. When this Court defined the relevant parcel it referred only to the regulated area. *Id.* at 130-131, 98 S. Ct. at 2662-63. This Court rejected the more expansive notion advanced by the New York Court of Appeals which included other properties in

8. *See also* John E. Fee, *Unearthing the Denominator in Regulatory Takings Claims*, 61 U. Chi. L. Rev. 1535 (1994). Fee explains the logic of compensating independent economic units within the regulated area:

> Similarly, the fact that an owner holds adjacent property which may still be developed, or considered his property as part of a larger parcel, should not bar his compensation for the lost property any more than if the state had taken the title to his lands. The standard of independent economic viability restores this basic intuition to the law. It also significantly improves the clarity and predictability of regulatory takings law. Finally, it provides a rational basis for assessing whether a citizen has been called upon to sacrifice too much in the interests of society, and for correcting those costs through just compensation.

Id. at 1563; *see also Machipongo*, Pet. App. 126a; 719 A.2d at 1927 (for an example of the "facial unfairness in th[e] approach" of considering more than the regulated land).

Manhattan. *See also Lucas*, 505 U.S. at 1016 n.7, 112 S. Ct. at 2894 n.7 (calling the New York Court of Appeals' effort to consider all of the claimant's holdings in the vicinity "an extreme — and, we think, unsupportable — view of the relevant calculus").

A reading of *DeBenedictis* also leads to the conclusion that the regulated parcel was selected as the denominator from a *horizontal perspective* in that case. *DeBenedictis* involved a facial challenge to a regulation. Consequently the record did not establish the effect of the regulation on any particular area of petitioners' properties. 480 U.S. at 493, 107 S. Ct. at 1246. As a result, the Court had no alternative but to treat all of petitioners' properties (which included much of Western Pennsylvania) as the relevant parcel because it could not identify any particular parcel where the regulation applied. Even though the regulation required fifty percent of the coal seams to remain in place, it was impossible to establish the effect of the regulation on any particular area of the petitioners' holdings. *Id.* Consequently, the Court was relegated to analyzing the effect of the regulation on petitioners' entire holdings as the relevant parcel as that was the way the case was presented. Under such circumstances, the Court reached the conclusion a partial taking had occurred as the fifty percent claimed as lost was never identified as a discrete parcel, unlike the present case.

The lower court has ignored the impact of the Regulation on the Coal Owners' land within the regulated area and has looked to other factors to determine the relevant parcel:

> These factors would include, but would not be limited to: unity and contiguity of ownership, the dates of acquisition, the extent to which the proposed parcel has been treated as a single unit, the extent to which the regulated holding benefits the unregulated holdings; the timing of transfers, if any, in light of the developing regulatory environment; the owner's investment backed-expectations; and, the landowner's plans for development.

Pet. App. 35a; 799 A.2d at 768-769 (citations omitted). The lower court's test is designed to draw attention away from the impact of the Regulation and to focus on the landowner's status before the Regulation was adopted. This approach ignores the focal point of the entire inquiry: whether the effect of the Regulation constitutes a taking. Its test is transparently unfair because it ignores the consequences of the government action. It is "open ended" and allows the trial court to introduce additional, yet undefined requirements, into the takings mix. It creates a moving target for the landowner which implicates equal protection and due process concerns. In essence, it seeks to reintroduce the focus of the New York Court of Appeals in *Penn Central*, to the surrounding properties as well as other factors. Under the lower court's test, the landowner would never know when he had been "called upon to sacrifice too much in the interests of society." Fee, 61 U. Chi. L. Rev. at 1563. The lower court's test has already been rejected by this Court as an extreme and unsupportable calculus. *Lucas*, 505 U.S. at 1016 n.7, 112 S. Ct. at 2894 n.7.

This Court has never explicitly defined what constitutes the "parcel" from a horizontal perspective. This is a question that has not been addressed directly by this Court, although the Court has recently indicated its "discomfort with the logic of [the parcel as a whole] rule." *Palazzolo*, 533 U.S. at 631, 121 S. Ct. at 2465.[9] The Pennsylvania Supreme Court has attempted to predict the direction of this Court in its determination and has utterly failed. The issue is one of nationwide significance and merits review by this Court.

---

9. *See also* Richard A. Epstein, *Takings: Descent and Resurrection*, 1987 Sup. Ct. Rev. 1 (1987); Fee, *supra*; Michelman, *supra*.

III. A STATE MAY NOT AVOID THE PAYMENT OF JUST COMPENSATION FOR A REGULATORY TAKING RESULTING FROM THE ADOPTION OF A REGULATION THAT PROHIBITS THE MINING OF COAL, BASED UPON PURPORTED BACKGROUND PRINCIPLES OF ITS NUISANCE LAW, WHERE THE STATE HAS PERMITTED OTHERS TO MINE COAL IN THE SAME AREA BOTH BEFORE AND AFTER THE ADOPTION OF THE REGULATION.

This Court concluded in *Lucas* that where a "total taking" has occurred that the state can avoid the payment of just compensation only if "the proscribed use interests were not part of his title to begin with." 505 U.S. at 1027, 112 S. Ct. at 2899. In this case, the lower court readily admitted that mining is not a nuisance *per se* in Pennsylvania. Pet. App. 49a; 799 A.2d 775.

If the Pennsylvania Supreme Court had followed the analysis set out in *Lucas*, its inquiry should have begun with whether there was other mining in the vicinity of the regulated area and the effects of that mining. *See Lucas*, 505 U.S. at 1030-31, 112 S. Ct. at 2901. Had the lower court looked to the record, it would have found uncontroverted evidence that: 1) there was extensive mining within the Goss Run Watershed both before and after the adoption of the Regulation. *See* R. 260a-261a; Map, Pet. App. 144a; 2) there was extensive mining immediately outside the Goss Run Watershed both before and after the designation, R. 261a; 3) there were at least ten deep mine openings within the Goss Run UFM area, R. 261a; 4) the existing surface mines had never been cited for polluting Goss Run, R. 543a, or shut down as a result of the designation, R. 261a; and 5) that Petitioners' experts had testified that the areas covered by Petitioners' proposed mines would be permitted and mined without polluting Goss Run, and this testimony was never controverted by the Commonwealth. R. 701a-702a, 710a-711a, 967a; *see also* Pet. App. 93a. The ineluctable conclusion that would have followed would have

been that the Coal Owners' right to mine was a part of their property rights and entitled to Fifth Amendment protection.

Rather than following the *Lucas* "total taking inquiry" for determining whether the right to mine was a part of Petitioners' title, the lower court adopted a rule purportedly based upon its background principles of nuisance law that the proscribed use interest was not mining but the potential pollution of Goss Run as a defense to the taking. This test ignores the permitting process of PaSMCRA under which the Petitioners develop geological background data and a mining plan to demonstrate, as the other miners had done in the area, that mining can be accomplished without presumptive evidence of polluting Goss Run. Rather, its test preempts such a process and prevents the gathering of evidence to determine "the relative ease with which the alleged harm can be avoided through measures taken by the claimant." *Lucas*, 505 U.S. at 1031, 112 S. Ct. at 2901.[10] It ignored the traditional balancing test set forth in *Lucas* and adopted a *per se* test as a defense to the taking.

The lower court's rule is inherently unfair and is an example of the "noxious use logic" that has been rejected by this Court. A close reading of the Regulation shows the state excepted the active mines within the watershed from the Regulation's effect — "hardly the action of one out to abate a 'nuisance' or anything 'injurious to the health, morals, or safety of the community.'" *Whitney Benefits*, 926 F.2d at 1177 (quoting *DeBenedictis*, 480 U.S. at 489, 107 S. Ct. at 1244). The test is a transparent attempt to revitalize this Regulation in spite of the failure of the Commonwealth to establish any basis in the record to prevent permitting and consequently mining by these Petitioners.

As this Court has recently held, "[a] regulation or common-law rule cannot be a background principle for some owners but not for others." *Palazzolo*, 533 U.S. at 630, 121 S. Ct. at 2464.

---

10. The Commonwealth Court recognized that the Commonwealth was seeking to deprive the Petitioners of a "full blown due process hearing" by preempting the process through a "legislative act." Pet. App. 106a n.3.

The lower court has attempted to create a *per se* rule that would apply to the Petitioners, but not to neighboring mine operators, in direct violation of this and the aforementioned principles. It is clear that mining is a property right that "inhere[s] in the title" to the land. *Lucas*, 505 U.S. at 1029, 112 S. Ct. at 2900. In fact, with respect to the coal estate, the *only* right that "inheres" in Coal Owners' title is the right to mine.

The Pennsylvania Supreme Court has attempted to fashion a new *per se* rule regarding background principles on the pretext that the Commonwealth has a right to prevent nuisances before they occur. In reality, the lower court is attempting to deny the Coal Owners their due process rights to obtain a permit and mine the coal. Moreover, the lower court's effort at creating a new rule is directly at odds with the background principles of state law rule established by this Court as well as the record in this case. Consequently, this Court should review the ruling of the Pennsylvania Supreme Court and overturn that ruling.

IV. WHERE THERE WAS NO INTERMEDIATE APPELLATE COURT, THE LOWER COURT SHOULD HAVE USED THE STANDARD OF REVIEW SET FORTH IN *EASLEY v. CROMARTIE* TO EVALUATE THE TRIAL COURT'S FACTUAL FINDINGS IN ITS DISMISSAL OF A REGULATORY TAKINGS CLAIM UNDER THE FIFTH AMENDMENT.

In a case involving the enforcement of important constitutional rights, this Court has ruled that in the absence of an intermediate appellate court, the role of the Supreme Court is to review the findings of the trial court, for clear error, and, if necessary, to overturn the trial court. *Easely*, 532 U.S. at 242, 121 S. Ct. at 1458. The Pennsylvania Supreme Court, which did not have the benefit of an intermediate appellate court, yet which was ruling on important Constitutional rights, utterly failed in this responsibility.

Easely involved a challenge, under the Equal Protection Clause, of the petitioners' voting rights relative to a redistricting plan. *Id.* at 237, 121 S.Ct at 1456. A trial was held before a three judge panel and the appeal was a direct appeal to this Court. As it relates to *Machipongo*, this Court held:

> Where an intermediate court reviews, and affirms, a trial court's factual findings, this Court will not 'lightly overturn' the concurrent findings of the two lower courts. But in this instance there is no intermediate court, and we are the only court of review. Moreover, the trial here at issue was not lengthy and the key evidence consisted primarily of documents and expert testimony. Credibility evaluations played a minor role. Accordingly, we find that an extensive review of the District Court's findings, for clear error, is warranted.

Easely, 532 U.S. at 242-43, 121 S. Ct. at 1458-59 (citations omitted).

In *Machipongo*, the Pennsylvania Supreme Court in reviewing the Commonwealth Court's findings of fact as they related to Petitioner Machipongo's important Fifth Amendment rights, "accept[ed]" the Commonwealth Court's factual determination regarding the economic viability of the proposed mining operation. Pet. App. 50a-51a; 799 A.2d at 775. In particular, the Pennsylvania Supreme Court noted that "[t]he Commonwealth Court considered detailed scientific evidence of the economic viability of mining coal in the UFM area and determined that 'the Machipongo Surface Mine . . . was not economically feasible." *Id.* (citation omitted). Significantly, the Pennsylvania Supreme Court held that "[t]he Commonwealth Court's legal reasoning on the issue is sound and there is no basis here to alter its factual findings. Accordingly,

the Property Owners are not entitled to compensation with regard to the Machipongo Surface Mine." *Id.*[11]

The Coal Owners documented in their brief to the Pennsylvania Supreme Court two significant areas of "clear error" committed by the Commonwealth Court relating to this proposed mine, which had it reversed would have required a finding of mineabity of the proposed Machipongo surface mine. These included: the failure of Commonwealth Court to consider the total thickness of the coal reserve, *See* Petitioners' Pennsylvania Supreme Court Brief at 51-56; and, the failure to consider that *both* the Coal Owners *and* the Commonwealth's experts had testified that Machipongo's surface mineable coal was economically mineable, *See id.* at 56-62. Had the Pennsylvania Supreme Court reviewed the record, that court would have reached the conclusion that the Commonwealth Court committed clear error.

The Pennsylvania Supreme Court, however, made no effort (at least, none which it documented) to review the Commonwealth Court's findings for clear error. Even though the majority of the evidence in *Machipongo*, like the evidence in *Easely*, consisted of expert testimony and documents, and a review could have been readily accomplished, the Pennsylvania Supreme Court neglected this role. This failure of the Pennsylvania Supreme Court is particularly egregious in view of the fact that the Petitioners were seeking the protection of their Fifth Amendment property rights and no intermediate appellate court had reviewed the record to determine whether Commonwealth Court had acted properly.

---

11. In addition to the faulty reasoning of the Pennsylvania Supreme Court with respect to its failure to review the factual record, the court's affirmation of the Commonwealth Court's "legal reasoning on this issue" is logically inconsistent with the remainder of its opinion. Relative to the regulatory taking, the Pennsylvania Supreme Court does not affirm the legal reasoning of the Commonwealth Court. In fact, the Pennsylvania Supreme Court explicitly reversed the Commonwealth Court on the legal test it employed to make its determination regarding the taking of the coal. Pet. App. 33a-39a; 799 A.2d at 768-71.

The standard of review employed by the Pennsylvania Supreme Court is in conflict with the recent determination of this Court in *Easely.* This case merits immediate review.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

JOEL R. BURCAT
CHRISTINE STEIB STICKLER
SAUL EWING LLP
Two North Second Street
7th Floor
Harrisburg, PA 17101
(717) 257-7506

CARL A. BELIN, JR.
Counsel of Record
BELIN & KUBISTA
P.O. Box 1
15 North Front Street
Clearfield, PA 16830
(814) 765-8972
Counsel for Petitioners

APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF PENNSYLVANIA, MIDDLE DISTRICT, DECIDED MAY 30, 2002

[J-172-2001]

IN THE SUPREME COURT OF PENNSYLVANIA MIDDLE DISTRICT

Nos. 112 MAP 2000 and 119 MAP 2000

ARGUED: November 13, 2001

MACHIPONGO LAND AND COAL COMPANY, INC. AND THE VICTOR E. ERICKSON TRUST AND JOSEPH NAUGHTON,

Appellees,

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE ENVIRONMENTAL QUALITY BOARD AND ARTHUR A. DAVIS, SECRETARY OF ENVIRONMENTAL PROTECTION,

Appellants.

Appeal from Decree Nisi of Commonwealth Court entered as final judgment on October 19, 2000 at No. 248MD1992.

Appendix A

OPINION

MADAME JUSTICE NEWMAN DECIDED May 30, 2002

When state government determines that an intended use of private property conflicts with legitimate public purposes, there can be no doubt concerning the power of the government to prohibit the private use. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124-125 (1978); *Machipongo Land and Coal Co., Inc. v. Commonwealth*, 676 A.2d 199, 202 (1996). Indeed, "[l]ong ago it was recognized that 'all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community.' " *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 491-492 (1987) (quoting *Mugler v. Kansas*, 123 U.S. 623 (1887)). However, in our constitutional democracy, government's power to protect the public is tempered by the level of intrusion upon individual property rights. The United States Constitution provides:

> No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V. Similarly, the takings clause in the Pennsylvania Constitution provides:

> [N]or shall private property betaken or applied to public use, without authority of law and without just compensation being first made or secured.

PA. CONST. art. I, § 10. On the other hand, the responsibility of government to protect the environment from private injury is also clear. PA. CONST. art. I, § 10 provides that:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

In this case, we are required to weigh the governmental obligation to protect the environment against the individual right to do as one wishes with property one owns.

Specifically, this case asks us to determine whether the designation of the Clearfield County Goss Run Watershed as unsuitable for mining ("UFM"), pursuant to Section 4.5 of the Pennsylvania Surface Mining Conservation and Reclamation Act ("PaSMCRA"), Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. § 1396.4e(b), was so unduly oppressive so as to constitute a taking.

The Regulation, its Origins, and Purposes

In 1980, the General Assembly amended the PaSMCRA to comply with the Federal Surface Mining Control and Reclamation Act (FSMCRA), 30 U.S.C. § 1201, which required states that wished to regulate mining to meet specific federal requirements. Among those requirements, was one

directing states to create a mechanism to designate certain lands as UFM. 30 U.S.C. § 1272. In Section 1201(c), Congress explained that FSMCRA was necessary to protect the environment, its water and its streams from pollution caused by mining. Section 1201(c) provides:

> [M]any surface mining operations result in disturbances of surface areas that burden and adversely affect commerce and the public welfare by destroying or diminishing the utility of land for commercial, industrial, residential, recreational, agricultural, and forestry purposes, by causing erosion and landslides, by contributing to floods, by polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty, by damaging the property of citizens, by creating hazards dangerous to life and property by degrading the quality of life in local communities, and by counteracting government programs and efforts to conserve soil, water, and other natural resources.

30 U.S.C. § 1201(c).

In *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264 (1981), where the U.S. Supreme Court rejected a claim that the FMCRA was facially unconstitutional, the Court also explained the purposes of the FMCRA by quoting U.S. Senate and House Committee reports. Those reports detailed the need for legislation to protect the environment from the "adverse effects of surface coal mining." *Id.* at 279. The Senate Report concluded that:

Appendix A

> [Surface] coal mining activities have imposed large social costs on the public . . . in many areas of the country in the form of unreclaimed lands, water pollution, erosion, floods, slope failures, loss of fish and wildlife resources, and a decline in natural beauty.

Hodel, 452 U.S. at 279 (quoting S.Rep. No. 95-128, p. 50 (1977)). The House Report noted the effect on streams. It stated:

> Acid drainage which has ruined an estimated 11,000 miles of streams; the loss of prime hardwood forest and the destruction of wildlife habitat by strip mining; the degrading of productive farmland; recurrent landslides; siltation and sedimentation of river systems. . . .

Hodel, 452 U.S. at 279-280 (quoting H.R.Rep. No. 95- 218, p. 58 (1977), 1977 U.S.C.C.A.N. 596, (quoting H.R.Rep. No. 94-1445, p. 19 (1976)).

Pennsylvania codified the federal criteria to be used to determine whether land should be deemed unsuitable for mining. 52 P.S. § 1396.4e(b). 52 P.S. § 1396.4e(b) provides:

> (b) Pursuant to the procedures set forth in this subsection, the department may designate an area as unsuitable for all or certain types of surface mining operations if such operations will:

(1) be incompatible with existing State or local land use plans or programs;

(2) affect fragile or historic lands in which such operations could result in significant damage to important historic, cultural, scientific and esthetic values and natural systems;

(3) affect renewable resources lands in which such operations could result in a substantial loss or reduction of long-range productivity of water supply or of food or fiber products and such lands to include aquifers and aquifer recharge areas; or

(4) affect natural hazard lands in which such operations could substantially endanger life and property, such lands to include areas subject to frequent flooding and areas of unstable geology.

The General Assembly recited that the purpose of the PaSMCRA is to "prevent . . . the pollution of rivers and streams," protect wildlife and the environment generally, and to maintain jurisdiction over in-state mining activities. 52 P.S. § 1396.1. Additionally, the regulation sought to "strike a balance" between the environment and ensuring a ready supply of coal. *Id.*

Appendix A

The UFM Designation and the Property of Machipongo Land and Coal Co., Inc., the Victor E. Erickson Trust and Joseph Naughton

Pursuant to 52 P.S. § 1396.4e(b), in May of 1989, the Brisbin Recreation Board and the Locust Grove Sportsmen Club filed a petition with the Pennsylvania Department of Environmental Resources[1] ("DER") requesting that the Goss Run Watershed (the "Watershed") be declared unsuitable for mining. The Petition sought a UFM designation for the entire area of the Goss Run stream extending to a point below the Brisbin Dam.

The regulation, which would have the effect of prohibiting the mining of coal in a large portion of the Watershed, affected the rights of the owners of property in the UFM area. Those property owners included Appellees, Machipongo Land and Coal Co., Inc., the Victor E. Erickson Trust and Joseph Naughton (Collectively, the "Property Owners").

Machipongo Land and Coal Co., Inc. ("Machipongo") is a Pennsylvania corporation, doing business in Clearfield County, Pennsylvania. Machipongo owns in fee simple 373 acres within the UFM area and 200 acres outside of the area. (R. 260a, 403a-405a, 414a). It also owns a coal estate of 1000 acres in Clearfield County outside of the UFM area. (R. 260a). Arthur Minds, a Machipongo Vice President, testified at trial that sometime around 1915 or 1917 his

1. Effective July 1, 1995, the General Assembly renamed the Department of Environmental Resources the Department of Environmental Protection. 71 P.S. § 1340.101.

grandparents acquired the Machipongo property. (R. 1037a). He said that his grandfather was in the coal business and that Machipongo now holds the property for future coal development. *Id.* Machipongo stipulated that it did not know what its predecessors in title paid for the property (R. 263a) and the record does not disclose whether Machipongo paid anything for its interest.

Machipongo has owned the property for approximately forty-eight years and owned it on May 23, 1992, the effective date of the UFM designation. (R. 263a). The parties also stipulated that Machiongo has used land within the UFM area for purposes other than coal mining. Specifically, Machipongo has sold timber and entered into leases for gas development. *Id.* at R. 262a-263a.

The Naughton/Erickson Property Owners also own property in the UFM area. They own a coal estate of fifty-two acres within the UFM area and a fee simple title to 1,150 acres and 250 acres of coal estate situated outside of the UFM area. (R. 260a). The parties also stipulated that the Naughton/ Erickson Property Owners have used their land for purposes other than coal mining, including entering into leases for gas development. (R.263a).

The Naughton/Erickson property is owned jointly. Specifically, Joseph Naughton owned a 1/5 interest and Victor E. Erickson owned the remaining 4/5 interest. (R. 256a, 260a, 263a). Joseph Naughton obtained his interest through a series of deeds dated February 17, 1961 as a distribution from the Estate of William Henry Naughton, who obtained his interest pursuant to deeds dated April 26, 1945. (R. 260a).

Appendix A

Victor E. Erickson was one of four people who obtained an interest in the land in the 1940s from the Elk River Coal Co. ("Elk River"). Elk River was affiliated with the Berwin & White Coal Co., where Victor E. Erickson had been a long-time employee responsible for closing mines and disposing of company property. (R. 104a-105a). Victor E. Erickson then purchased the interests of the other three for an unknown sum. (R. 105a). In 1984, Victor E. Erickson transferred his interest to the Victor E. Erickson Trust, retaining a life estate for himself, followed by a life estate in his wife. (R. 288a-303a). Upon the death of Victor E. Erickson and his wife on August 23, 1985 and March 26, 1991 respectively, the beneficiaries of the Victor E. Erickson Trust were the sole owners of their interest in the property. (R. 1077a). The Victor E. Erickson Trust was the owner of the Erickson interest on the date DER designated the property UFM. *Id.* On December 16, 1994, the beneficiaries of that trust created a new trust, the Erickson Family Trust, to which they transferred their interest in the land. (R. 256a). The beneficiaries of the Erickson Family Trust were the same people who, in 1992, originally commenced this lawsuit, in their capacity as remainder beneficiaries of the Victor E. Erickson Trust. (R. 1077a).

On January 5, 1990, Property Owners requested and were granted leave to intervene in the DER administrative proceedings. (R. 257a). At the public hearing, Property Owners presented fact and expert witnesses. (R. 258a-259a). After the hearing, DER conducted a technical study to determine whether to designate the Watershed as UFM pursuant to the criteria set forth in 52 P.S. § 1396.4e. (R. 258a). According to the Commonwealth Court, the study

concluded that surface mining of coal within the Watershed had a **"high potential to cause increases in dissolved solid and metal concentrations in Goss Run that would adversely affect the use of the stream as an auxiliary water supply" and "a significant potential to disrupt the hydrologic balance causing decreases in the net alkalinity of discharges . . . destroying the habitat for wild trout populations."** *Machipongo Land and Coal Co., Inc. v. Commonwealth*, No. 248 M.D.1992, slip op. at 3 (Pa.Cmwlth. August 21, 2000) (emphasis added).

Consequently, DER recommended that the Environmental Quality Board ("EQB") approve a regulation designating the surface mineable coals located within the Watershed upstream of the Brisbin Dam as UFM.[2] The EQB approved the proposed regulation. The regulation provides:

> The surface mineable coal reserves within the Goss Run Watershed upstream of the Brisbin Dam, including a small tract of land within the watershed of the West Tributary to Goss Run, a total of approximately 555 acres, are designated unsuitable for all types of surface mining activities.

25 Pa.Code § 86.130(h)(14).

---

2. The final regulation was substantially more limited than the proposal. Specifically, the UFM designation did not extend past the Brisbin Dam. The regulation also provided that it did not apply to areas within the UFM area where DER had previously permitted mining, including the Bonita and Cowfer permit areas. 25 Pa.Code § 86.130(h)(14).

Appendix A

Procedural History

In 1992, Property Owners sued the Commonwealth of Pennsylvania, DER, EQB and DER Secretary Arthur A. Davis (collectively, the "Commonwealth"). Property Owners claimed that the regulation took their property without compensation. They requested that the Commonwealth Court declare the regulation invalid and refer the case to the Common Pleas Court for a determination of damages pursuant to the Eminent Domain Code. *Machipongo Land and Coal Co., Inc. v. Commonwealth*, 624 A.2d 742, 746 (1993) (*Machipongo I*).

In response to the 1992 complaint, the Commonwealth filed preliminary objections and a demurrer. *Id.* at 745. The court considered the arguments of the parties and determined that the section of the PaSMCRA at issue was not facially unconstitutional; *Id.* at 750, but that the Environmental Hearing Board ("EHB") should determine whether its application to the Property Owners constituted a taking. *Id.* at 753-755. The court also held that because it would have been futile to seek further administrative relief, Property Owners did not fail to exhaust their administrative remedies. *Id.* at 751.

Property Owners appealed to this Court. *Machipongo Land and Coal Co., Inc. v. Commonwealth*, 648 A.2d 767 (Pa. 1994) (*Machipongo II*). We affirmed the Commonwealth Court's determination that Property Owners need not have pursued further administrative relief before seeking redress from the courts. *Id.* at 769. However, we disagreed with the holding of the court to the extent that it stated that the EHB

stated that the EHB was the proper forum in which the case should proceed. Instead, we determined that the Court of Common Pleas of Clearfield County had jurisdiction. *Id.* at 770.

Thereafter, we granted reargument to consider whether the Commonwealth Court or the Court of Common Pleas should have jurisdiction over further proceedings to resolve the issue of whether the "state action taken pursuant to its police powers [had] gone too far and constitute[d] a *de facto* taking requiring the state to provide just compensation." *Machipongo Land and Coal Co., Inc. v. Commonwealth*, 676 A.2d 199, 203, n.3 (1996) (*Machipongo III*). We observed that the Judicial Code provides that the Commonwealth Court shall have jurisdiction over all civil actions against the Commonwealth, but shall not have jurisdiction in eminent domain proceedings. *Id.* (citing 42 Pa.C.S. § 761). We then examined the nature of the action against the Commonwealth to determine whether it fell within the eminent domain exception to the jurisdiction of the Commonwealth Court. *Machipongo III*, 676 A.2d at 202. Because the PaSMCRA, the basis for the regulation the Property Owners challenged, was promulgated pursuant to the police power[3] and not the power of eminent domain, we

3. Section 1 of the PaSMCRA provides, in pertinent part, that: "[the] act shall be deemed to be an exercise of the police powers of the Commonwealth for the general welfare of the people of the Commonwealth [.]" 52 P.S. § 1396.1.

Regulations promulgated pursuant to the police power are distinguishable from those issued pursuant to the eminent domain

(Cont'd)

determined that the exception to jurisdiction did not apply. *Id.* at 202-203. Consequently, we vacated our prior Order only to the extent that it had remanded the case to the Court of Common Pleas. Instead, we returned the matter to the Commonwealth Court to consider whether the regulation constituted a taking.

Property Owners then filed a petition for review with the Commonwealth Court. They challenged the designation of their property as UFM. *Machipongo Land and Coal Co., Inc. v. Commonwealth*, 719 A.2d 19 (Pa.Cmwlth.1998) (*Machipongo IV*). The Commonwealth moved for summary judgment, asserting that the designation was a proper exercise of police power and was not unduly oppressive. *Id.* at 23. Property Owners argued that the regulation had deprived them of the right to mine their coal and that it was a taking because it denied them all economic use of their property. *Id.* The Commonwealth Court recited factors that the U.S. Supreme Court has identified as relevant to the determination of whether a categorical taking had occurred:

(Cont'd)
power of the Commonwealth. In *Machipongo III*, 676 A.2d at 202, this Court quoted its decision in *Appeal of White*, 134 A. 409 (1926), where we stated that:

> [P]olice power should not be confused with that of eminent domain. Police power controls the use of property by the owner, for the public good, its use otherwise being harmful, while eminent domain and taxation take property for public use. . . .

Id. at 411.

- whether the public interest requires regulatory interference with the property right;

- whether the regulation is reasonably related to that goal;

- whether the amount of property taken deprives an owner of all economical viable uses of the property, measured by what is taken (the numerator) against what was left (the denominator);

- whether the property owner's actions or proposed actions would cause a nuisance.

Id. at 26 (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)). The Court then discussed the problems courts have had in determining what parcel of land to use as the denominator in the third factor articulated above. *Machipongo IV*, 719 A.2d at 26. Citing John E. Fee, *Unearthing the Denominator in Regulatory Takings Claims*, 61 U. CHI. L. REV. 1535 (1996), the Commonwealth Court decided to use the coal estates within the UFM area as the denominator.[4] *Machipongo IV*, 719 A.2d at 29. Because the

4. However, the approach of the law review article was never intended to apply in vertical segmentation cases. Specifically, the article explained that:

> [u]nder a rule of substantiality, however, the ability of the owner to define the parcel would be limited in two important ways. First the rule would apply only to horizontal divisions of land. Under clear Supreme Court

(Cont'd)

takings equation compares the use taken away by the regulation with all the possible uses, the decision to use the coal estates as the denominator guaranteed a taking unless application of the following three considerations, listed by the Commonwealth Court, made the property valueless. Those considerations were:

1. whether the regulated land had value prior to the regulation;

2. whether the regulated land has a separate use from the non regulated contiguous parcel(s); and

3. if the regulated land has value separate from the contiguous land, whether all of its economic benefit is gone.

Id. at 28. The Commonwealth Court explained that the purpose of the considerations was to ensure that it did not find a taking if the subject land did not have any value. That is, if the land did not have value before the regulation, there is no taking because the government should not be deemed to take property that has no independent value.

(Cont'd)

> precedent, a property owner would have no authority to divide property rights into uses, easements, servitudes or the like. In addition, under the authority of [*Penn Central*, 438 U.S. 104] and *Keystone*, **courts must consider all air, surface, and subsurface rights of a particular parcel as a single bundle of property rights.**

Fee, 61 U. CHI. L.REV. at 1558 (emphasis added).

On the other hand, if the land had value separate from unregulated contiguous land, and the regulation made the land valueless, the regulation would constitute a taking. *Id.*

The Commonwealth Court then cited to Pennsylvania cases that have held that Pennsylvania recognizes separate estates in the same piece of land including: surface; coal/mineral; and support. The court reasoned that because the estates in land may be separated for purposes of ownership, the coal estate should be used as the parcel to determine whether a taking has occurred. Because it found that issues of fact existed; though, as to whether the coal estate had any independent value, the court denied the summary judgement motion. *Id.* at 30.

Senior Judge Rodgers dissented. He would have granted summary judgment in favor of the Commonwealth because he believed that the majority improperly used the coal estates as the denominator in the takings equation. *Machipongo IV*, 719 A.2d at 30. He explained that:

> [the Commonwealth Court] has acknowledged that for the purpose of deciding taking issues under the federal constitution, the vertical division recognized in Pennsylvania law that coal, surface, and the right to support are three separate estates is without significance.

Id. In his view, the alternative uses of the property and the fact that the regulation affected a relatively small portion of their property foreclosed the finding of a taking.

Appendix A

> It is undisputed that the petitioners in this case have other uses for their properties, including the sale of oil and gas rights, the sale of timber, and the sale of land for residential and other uses. The petitioners have therefore failed to adduce any evidence of a taking under federal law.

Id. Consequently, Senior Judge Rodgers would have held that the regulation was not a taking. *Id.* at 31.

After denying the summary judgment motion, the Commonwealth Court addressed the question of whether the Commonwealth would be allowed to introduce evidence at trial that the proposed mining activities would constitute a public nuisance. *Machipongo Land and Coal Co., Inc. v. Commonwealth*, No. 248 M.D.1992, slip op. at 2 (Pa.Cmwlth. October 28, 1999) (*Machipongo V*). The Commonwealth argued, pursuant to *Lucas, supra.*, that if the Property Owners' proposed actions constituted a nuisance, the regulation could not be a taking. Rejecting that argument, the Commonwealth Court declined to permit the Commonwealth to present evidence of nuisance because it held, as a matter of law, that the proposed actions of Property Owners could not rise to the level of a public nuisance. *Machipongo Land and Coal Co., Inc. v. Commonwealth*, No. 248 M.D.1992, slip op. at 8 (Pa.Cmwlth. August 21, 2000) (*Machipongo VI*).

The case proceeded to trial where Property Owners claimed that the regulation was a taking with regard to their coal rights as to three separate sections of the UFM area.[5]

5. Erickson Surface Reserves: a 27-acre area west of the Bonita Surface Mining Pit; Machipongo Surface Reserves: a 35-acre area (Cont'd)

Appendix A

Because the Commonwealth Court had already determined that the coal estates (as opposed to the property as a whole) were to be used as the takings denominator, the only fact that the Commonwealth Court deemed to be at issue was "whether there . . . [was] sufficient mineable coal, in amount and quality, for . . . [Property Owners] to economically mine each of those reserves." *Id.* at 12-13.

The Commonwealth Court did not address the issue of compensation. Instead, it explained that "if any and all of the reserves are economically mineable, then the UFM designation for that portion of the coal reserves deemed mineable will be stricken." *Id.* After consideration of detailed scientific evidence of the economic viability of mining coal in the UFM area, the Commonwealth Court determined that "because . . . the proposed [Naughton/Erickson] Surface Mine and the Machipongo Underground mine [we]re economically viable, . . . the . . . designation [as UFM with regard to those areas] is stricken from the regulation." *Id.* at 37-38. However, "because the Machipongo Surface Mine . . . [is] not economically feasible, nothing was taken and the designation for that area remains in place." *Id.* at 38. Therefore, the Commonwealth Court struck the regulation with regard to part of the UFM area but not with regard to the entire area.

(Cont'd)
within the Watershed east of Goss Run and southeast of the Bonita Surface Mining Pit; and, Machipongo Underground Reserves: a 96-acre area west of Goss Run within the Goss Run UFM designation.

Appendix A

The parties appealed the Order of the Commonwealth Court. On September 26, 2001, we directed the parties to file supplemental briefs to address the following additional issues:

(1) whether the regulatory designation of certain areas as unsuitable for mining amounted to a regulatory taking;

(2) if such a taking has occurred, by what means may damages be sought, and;

(3) whether such a taking constitutes a personal right that passes to a successor in interest.

Machipongo Land and Coal Co., Inc. v. Commonwealth, Nos. 112 and 119 MAP 2000, Per Curiam Order at 1 (Pa. September 26, 2001).

Discussion

The Commonwealth contends that Erickson, a Property Owner, lacks standing to pursue its takings claim because the beneficiaries of the Victor E. Erickson Trust, the owner of the Erickson interest on the date DER designated the property UFM, transferred their interest in the Erickson property to the Erickson Family Trust. (R. 256a). The question is whether the transfer to the Erickson Family Trust divests Erickson of its standing to pursue a takings claim.

Appendix A

The U.S. Supreme Court has recently addressed the issue of standing in the context of another takings case. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S.Ct. 2448, (2001). *Palazzolo* is instructive in this case because it sets forth the position of the U.S. Supreme Court on the issue of whether a party who does not own regulated property on the effective date of a regulation, but later acquires it, has standing to assert a takings claim.[6] Therefore, we turn to the facts of *Palazzolo*. In 1957, Shore Gardens Inc., a corporation that Mr. Palazzolo formed with some associates, purchased land in Westerly, Rhode Island. After the purchase, Mr. Palazzolo bought out the other investors and became the sole shareholder. In 1971, Rhode Island created the Rhode Island Coastal Resources Management Council, which enacted regulations that prohibited building in wetlands unless there was a compelling public purpose for an exception. *Id.*, 121 S.Ct. at 2456. In 1978, the corporation was dissolved for failing to pay its taxes. As a result, by operation of Rhode Island Law, Mr. Palazzolo became the owner.

Mr. Palazzolo submitted a proposal to the Coastal Council for permission to fill eleven of his remaining eighteen acres to build a beach club. *Id.* The Coastal Council denied his application and the lower courts upheld the denial. On appeal, the Rhode Island Supreme Court held, among other things, that he lacked standing to raise an objection to the regulation because he became the owner of the property after the enactment of the regulations.

---

6. Although we are not bound by the decisions of the U.S. Supreme Court on issues of standing (*see ASARCO Inc. v. Kadish*, 109 S.Ct. 2037, 2045, 104 L.Ed.2d 696 (1989)), we find the reasoning of that Court persuasive.

Appendix A

The U.S. Supreme Court reversed. Although the justices addressed the standing issue in several separate Opinions, a majority held that Mr. Palazzolo had standing to raise the takings claim notwithstanding that ownership of the property was transferred to him after the effective date of the regulation. 121 S.Ct. at 2457. In regulatory taking cases that do not involve a physical invasion of private property, Justice Kennedy, Justice Thomas, and Chief Justice Rehnquist declined to adopt a "blanket rule" that would prevent a subsequent owner from asserting a taking claim. 121 S.Ct. at 2463. Justice O'Connor concurred and explained that the time of ownership should inform the Court's investment-backed expectation analysis and should not bar the claim of Mr. Palazzolo even though his corporation (and not Mr. Palazzolo) was the owner of the property on the effective date of the regulation. 121 S.Ct. at 2465- 2466. Justice Scalia would go even further. In his "view, the fact that a restriction existed at the time the purchaser took title . . . should have no bearing upon the determination of whether the restriction is so substantial as to constitute a taking. . . . [He further stated that a] . . . taking . . . is not absolved by the transfer of title." 121 S.Ct. at 2468. He reasoned that a taking is a constitutional claim that affects owners of land, and would not let the passage of title bar that claim.

Accordingly, a majority of the U.S. Supreme Court has held that the *Palazzolo* transfer of ownership, which occurred as a matter of law and transferred ownership from a corporation to an individual after the effective date of the regulation, did not prevent the individual from asserting a takings claim. A similar result should follow in this case. Consequently, we hold that where ownership of the Erickson

property transferred from one trust to another with no new beneficiaries and where the regulation did not authorize a physical invasion of private property, the change in ownership does not divest Erickson of standing to assert its takings claim.

Takings Analysis

The problem of balancing governmental power to regulate the permissible uses of private property with individual property rights is not a new one, but it is a problem that has not been solved despite multiple attempts to formulate a rule that would apply in all situations. The U.S. Supreme Court recognized that it has:

> quite simply . . . been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.

Penn Central, 438 U.S. at 124. Nevertheless, our Opinions and the Opinions of the U.S. Supreme Court have set forth some guiding principles.[7]

---

7. This Court has consistently relied upon the decisions of the U.S. Supreme Court when considering takings issues. We have stated:

> [a]n examination of our caselaw reveals that this Court has continually turned to federal precedent for guidance in its "taking" jurisprudence, and indeed has adopted the analysis used by the federal courts.

(Cont'd)

Appendix A

If a regulation authorizes a physical invasion of private property, no matter how slight, the U.S. Supreme Court has consistently concluded that a taking has occurred. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 422 (1982) (holding that a New York law requiring building owners to permit cable companies to install cable facilities on their premises constituted a taking). Clearly, "[a] taking may more readily be found when the interference with property can be characterized as a physical invasion by government[.]" *Penn Central*, 438 U.S. at 124.

In this case, we are not unsympathetic to the claim of Property Owners that the regulation "had the same effect as if the Commonwealth had mined the coal and hauled it away." Property Owners' Main Brief at 13. The reality is, however, that the regulation did not authorize the removal of any coal or any physical invasion of or access to their land. Indeed, as this Court explained in *Commonwealth v. Plymouth Coal Co.*, 81 A. 148 (1911), *aff'd*, 232 U.S. 531 (1914), requiring landowners to leave coal in the ground is not the equivalent of an appropriation of that coal. *Plymouth Coal*, 81 A. at 151. In holding that the statute at issue in *Plymouth Coal* did not constitute a taking, we said:

(Cont'd)
United Artists' Theater Circuit, Inc. v. City of Philadelphia, 635 A.2d 612, 616 (1993) (upholding a Philadelphia historic landmark ordinance, this Court applied *Commonwealth v. Edmunds*, 586 A.2d 887 (1991) test and held that, with regard to a landmark designation, the takings clause in the Pennsylvania Constitution does not provide more extensive protections than those offered by the U.S. Constitution).

> The coal itself is not taken. The property right affected by the statute is not ownership, but use, of the material thing — the right to mine it out. Nor does the state take that right for public use. The act does not transfer the right to mine out the coal from the owner to some one else, for the public benefit, but prohibits that right from being exercised by anyone. . . .

Id.[8]

Furthermore, not all regulations that affect private property require the government to purchase the land in order to regulate its permissible uses. Indeed, the government would quickly bankrupt itself if, every time it made a rule that affected private property rights, it had to purchase the property. *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 491 (1987). The U.S. Supreme Court has explained the utilitarian philosophical basis for permitting government to enact legislation that affects private property rights as follows:

> Under our system of government, one of the State's primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened

---

8. At issue in *Plymouth Coal* was the Anthracite Mining Act, Act of June 2, 1981, P.L. 183, *as amended,* 52 P.S. § 264 (repealed 1965), which required owners of adjoining mines to maintain a coal barrier between the mines. We held that the statute did not violate the takings clause of the Pennsylvania Constitution. *Id.* 81 A. at 151, 152.

> somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others. These restrictions are properly treated as part of the burden of common citizenship. . . . [T]he Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it.

Id. (internal citations omitted). Indeed, in this case we are mindful of the potential for extended litigation and extraordinary cost to the Commonwealth if compensation is required for all UFM designations.[9] The often repeated maxim that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law" rings truer today than ever. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

We have also recognized that the government may enact laws that have significant impact on private property rights without the need to compensate the affected landowner. *Miller & Son Paving, Inc. v. Plumstead Township*, 717 A.2d 483 (1998), *cert. denied*, 525 U.S. 1121 (1999). In *Miller*, we held that a landowner was not entitled to payment from the township that had prevented the operation of a quarry because "other viable uses [of the land] existed." *Id.* at 486. We explained, "that a taking does not result merely because a regulation . . . deprive[s] the owner of the most profitable use of his property. Otherwise all zoning regulations could

---

9. In addition to the instant UFM designation, the Commonwealth has designated sixteen other areas as UFM. *See* 25 Pa.Code § 86.130 b(1)- (17).

be categorized as 'takings' in the sense that the owner is not completely free to use his property as he chooses." *Id.* at 486. Our view is consistent with repeated holdings of the U.S. Supreme Court:

> It is, to be sure, undeniable that the regulations here prevent the most profitable use of appellees' property. Again, however, that is not dispositive. When we review regulation[s], a reduction in the value of property is not necessarily equated with a taking.

Andrus v. Allard, 444 U.S. 51, 66 (1979) (reviewing federal statute prohibiting the sale of products derived from eagles even if obtained before the statute's enactment); *Penn Central*, 438 U.S. at 124 (discussing landmark designation that prohibited construction of building over New York's Grand Central Station); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (examining application of town ordinance that prohibited a land owner from operating a sand and gravel pit notwithstanding that he had, for thirty-five years prior to the ordinance, used the land for that purpose); and *Miller v. Schoene*, 276 U.S. 272 (1928) (reviewing order requiring the removal of cedar trees to protect neighboring apple orchards from disease).

Although none of the foregoing governmental actions were found to constitute a taking, at some point, a regulation "goes too far." *Pennsylvania Coal Co.*, 260 U.S. at 415. A regulation goes too far when it forces "some people alone to bear public burdens which in all fairness and justice should be borne by the public as a whole." *Palazzolo*, 121 S.Ct. at

2458 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). This fairness and justice standard, although amorphous, necessarily guides our analysis.

The Standards: the Lucas Test and the Traditional Takings Analysis

In non-appropriation/non-physical invasion cases, the U.S. Supreme Court applies two tests to determine whether a taking has occurred. *Palazzolo*, 121 S.Ct. at 2457. The first test addresses the "relatively rare" situation in which a land use regulation deprives the owner of all use of his or her property. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017 (1992). The second "test" is the more traditional takings analysis, which becomes applicable if the regulation does not rise to the level of a *Lucas* taking. The U.S. Supreme Court explained that:

> [A] regulation which "denies all economically beneficial or productive use of land" will require compensation under the Takings Clause. *Lucas*, 505 U.S. at 1015.... Where, [however] a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending upon a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action. *Penn Central*, [438 U.S.] at 124.

Palazzolo, 121 S.Ct. at 2457. The U.S. Supreme Court has recently described this second test as an analysis pursuant to "the principles set forth in *Penn Central.*" *Palazzolo*, 121 S.Ct. at 2457 (internal citation omitted) (remanding consideration of a land use regulation — that did not rise to the level of a *Lucas* taking — to the Rhode Island Supreme Court for further proceedings consistent with *Penn Central*).

We will analyze this case based on the foregoing framework. First, we ask whether the regulatory action " 'denies [the Property Owners of] all economically beneficial or productive use of land.' " *Palazzolo*, 121 S.Ct. at 2457 (quoting *Lucas*, 505 U.S. at 1015). If it does, unless the use constitutes a nuisance, we will find that a taking has occurred. If not, we will consider whether, at this juncture, it is appropriate for this Court to undertake the *Penn Central* analysis.

Takings Denominator

Pursuant to either analysis, there is a threshold question, frequently referred to as the "denominator problem," which must be answered: what is the parcel against which the takings tests are applied? *See Keystone*, 480 U.S. 470 at 479. For if we define the area broadly, almost no government action — no matter how intrusive — will be found to be a taking. *See* John E. Fee, *Unearthing the Denominator in Regulatory Takings Claims*, 61 U. CHI. L. REV. 1535, 1536 (1996). Similarly, if we define the land too narrowly, virtually all government action that affects private property will be a taking that requires compensation and government will be inhibited from enacting necessary legislation. *Id.*

Appendix A

Because property is conceptualized as a "bundle" of "property rights", *see Loretto v. Teleprompter Manhattan CATV, Corp.*, 458 U.S. 419, 435 (1982), courts have had to struggle with what has been referred to as "severance" issues in defining the relevant parcel. See Marc R. Lisker, *Regulatory Takings and the Denominator Problem*, 27 RUTGERS L.J. 663 (Spring 1966) ("the Lisker Article"). In other words, the courts have been called upon to consider whether some of the property rights in the bundle may be severed from the others and viewed separately as the relevant parcel. Severance issues have involved the following: (1) the horizontal, physical division of property — is the relevant parcel all the land in a given geographic area that one owns or some smaller portion of that acreage, *Florida Rock Industries v. United States*, 791 F.2d 893 (Fed.Cir.1986); (2) the vertical division of property — can the parcel be divided among air rights, surface rights, and mineral rights, *Penn Central*, 438 U.S. at 130 and *Keystone*, 480 U.S. at 470 or (3) the temporal division of property — can the property be viewed in discrete temporal units, *Tahoe-Sierra Pres. Council Inc. v. Tahoe Reg. Planning Agency*, 535 U.S. __, WL 654431 (2002).

Resolving the denominator problem profoundly influences the outcome of a takings analysis. Again, the more narrowly the relevant parcel is defined, the more likely is the finding of a taking under either test, and vice versa. *See Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1180 (Fed.Cir.1994). In this case, defining the relevant parcel raises horizontal and vertical severance issues.

Appendix A

Vertical Conceptualization of Property

The U.S. Supreme Court has expressly rejected Pennsylvania's division of estates within a single parcel of land for the purposes of takings analysis. *Keystone*, 480 U.S. at 479-480, 500 (citing *Andrus*). Specifically, the Court stated:

> Pennsylvania property law is apparently unique in regarding the support estate as a separate interest in land that can be conveyed apart from either the mineral estate or the surface estate. Petitioners therefore argue that even if comparable legislation in another State would not constitute a taking, the Subsidence Act has that consequence because it entirely destroys the value of their unique support estate. **It is clear, however, that our takings jurisprudence forecloses reliance on such legalistic distinctions within a bundle of property rights.**

Keystone, 480 U.S. at 500 (emphasis added).[10] Accordingly, the U.S. Supreme Court held that the property as a whole was the unit of inquiry.

---

10. The Supreme Court affirmed the Third Circuit's determination that:

> To focus upon the support estate separately when addressing the diminution of the value of plaintiffs' property caused by the Subsidence Act therefore would serve little purpose. The support estate is more properly viewed as only one "strand" in the plaintiff's "bundle" of property rights, which also includes the mineral estate.

Keystone, 480 U.S. at 480.

Similarly, in *Penn Central*, where the city's landmark ordinance prohibited Grand Central Station from constructing an office building over the station, the Court refused to separate surface rights from air rights. The Court explained:

> **"Taking" jurisprudence does not divide a single property into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.** In deciding whether a particular governmental action has effected a taking, this Court focuses . . . on the nature and extent of the interference with rights in the parcel as a whole — here the city tax block designated as the landmark site.

Penn Central, 438 U.S. at 130-131 (emphasis added; internal quotations omitted).

Notwithstanding the clear rejection by the federal high court of Pennsylvania's division of estates, the U.S. Supreme Court, until recently, has left room for doubt as to whether the Court would always apply the "property as a whole" rule. In a footnote, and admittedly in *dictum*, the *Lucas* court observed that when a regulation's interference with the use of property approaches, but does not reach, the level where 100% of a portion of property is made valueless, "it is unclear" whether the Court would view the regulation as an impermissible deprivation of the portion or an appropriate "diminution in the property as a whole." *Lucas*, 505 U.S. at 1016-1017, n.7.

Appendix A

While the holdings of the U.S. Supreme Court have consistently supported the use of the "property as a whole" rule, the footnote in *Lucas* and the following statement in *Palazzolo* demonstrate that at least some members of the Court have misgivings about whether to apply that test in all situations. The Court recently addressed the issue of the appropriate property for takings analysis as follows:

> [Petitioner] argues, for the first time, that the upland parcel is distinct from the wetlands portions, so he should be permitted to assert a deprivation limited to the latter. This contention asks us to examine the difficult, persisting question of what is that proper denominator in the takings fraction. . . . Some of our cases indicate that the extent of deprivation effected by a regulatory action is measured against the value of the parcel as a whole, *see, e.g. Keystone*, 480 U.S. at 497; but we have at times expressed discomfort with the logic of this rule, *see Lucas*, 505 U.S. at 1016-1017, n.7 a sentiment echoed by some commentators, *see, e.g.*, Epstein, *Takings: Descent and Resurrection*, 1987 SUP.CT. REV. 1, 16-17 (1987); Fee, *Unearthing the Denominator in Regulatory Takings Claims*, 61 U.CHI. L. REV. 1535 (1994). Whatever the merits of these criticisms, we will not explore the point here. Petitioner did not press the argument in the state courts, and the issue was not presented in the petition for certiorari. The case comes to us on the premise that petitioner's entire parcel serves as the basis for this takings claim, and, so framed, the total deprivation argument fails.

Palazzolo, 121 S.Ct. at 2465 (internal citations modified and/or omitted). Notwithstanding the Court's misgivings, it declined to accept the invitation of Palazzolo to overrule the "property as a whole" rule. *Id.*, 121 S.Ct. at 2448. While the Court explained that it viewed the property as a whole because, at all times before the briefing of the case the parties discussed the property as a single parcel; the Court also did not overrule *Keystone* or *Penn Central*. Instead, the Court viewed the property as a whole and determined that there had been no *Lucas* taking. *Palazzolo*, 121 S.Ct. at 2465. Nevertheless, the *Lucas* footnote and the statement in *Palazzolo* have made clear that some members of the Court have retreated from the absolute application of the "property as a whole" rule. *Lucas*, 505 U.S. at 1016-1017, n.7.

Notwithstanding the foregoing misgivings of some members of the U.S. Supreme Court, that Court recently reaffirmed the validity of the property as a whole rule. *Tahoe-Sierra Preservation Council v. Tahoe Reg. Planning Agency*, 535 U.S. __, 2002 WL 654431, *12 (2002). In *Tahoe-Sierra*, Petitioners sought to divide their interests in land into temporal parts to claim that the statute, which imposed a temporary moratorium on development of private property surrounding Lake Tahoe, caused the restricted temporal portion of their property to become valueless. *Id.* at *14. The Court declined to allow Petitioners to so divide their property. *Id.* It held that the moratorium did not constitute a *Lucas* taking because a fee simple interest in property may not be temporally divided for the purpose of takings analysis. *Id.* at *14-15. The Court held that, when viewed as a whole the properties at issue retained value and that the temporary development prohibition did not rise to the level of a *Lucas* taking. The Court explained:

> Petitioners' "conceptual severance" argument is unavailing because it ignores *Penn Central's* admonition that in regulatory takings cases we must focus on "the parcel as a whole." We have consistently rejected such an approach to the "denominator" question. . . . Thus, the District Court erred when it disaggregated petitioners' property into temporal segments corresponding to the regulations at issue and then analyzed whether petitioners were deprived of all economically viable use during each period. . . .

Id. at *14-15 (internal citations omitted). Following *Tahoe-Sierra*, there can be no dispute that the "property as a whole" rule remains controlling.

As we have noted above, the U.S. Supreme Court has not instructed conclusively how the denominator problem should be resolved. However, that Court has refused to allow: vertical severance of the mineral estate in *Keystone*; vertical segmentation of air and surface rights in *Penn Central*; or temporal division of property in *Tahoe-Sierra*. Thus, in this case, the relevant parcel cannot be vertically segmented and must be defined to include both the surface and mineral rights.

Horizontal Conceptualization of Property

We now address the manner in which the property of the Property Owners is to be horizontally defined. The Commonwealth Court selected the coal estates in the UFM area as the property at issue and disregarded surface

rights and all other geographic areas. In contrast, the Commonwealth parties argued in favor of using all of the Property Owners' property in Clearfield County. It seems that the selection of the Commonwealth is overly inclusive and the selection of Property Owners and the Commonwealth Court is overly restrictive. It is difficult to imagine that either rule would prove satisfactory in all cases. Instead, we adopt a "flexible approach, designed to account for factual nuances". *Loveladies Harbor*, 28 F.3d at 1181. Pursuant to this approach, a variety of factors for defining the relevant parcel should be considered, without making one factor more important than any other. These factors would include, but would not be limited to: unity and contiguity of ownership, the dates of acquisition, the extent to which the proposed parcel has been treated as a single unit, the extent to which the regulated holding benefits the unregulated holdings; the timing of transfers, if any, in light of the developing regulatory environment; the owner's investment backed-expectations; and, the landowner's plans for development. *Id. See also Florida Rock Industries*, 791 F.2d at 893; *District Intown Properties Ltd. Partnership v. District of Columbia*, 198 F.3d 874 (D.C. Cir. 1999). However, because all of these factors are not part of the record, we remand to the Commonwealth Court for it to have the responsibility of considering the relevant facts and identifying the appropriate horizontal conceptualization of the property to use in both the *Lucas* and *Penn Central* analyses.

Lucas Analysis

We now turn to the *Lucas* test and a consideration of the issue concerning whether *Lucas* requires a finding that a

taking has occurred. *Lucas* stands for the proposition that regulations that deprive an owner of "all economically beneficial or productive use of land" are takings unless the use constitutes a public nuisance or are caused by the nature of the use and the owner could have expected that the government might prohibit it. *Lucas*, 505 U.S. at 1027-1029. Therefore, to conduct a *Lucas* analysis, we need to determine whether the subject regulation "deprives a landowner of all economically beneficial" use of his or her property. If so, the regulation will constitute a taking unless state property law independently prohibits the use. *Id.* at 1027.

Property Owners conceptualize this case as a *Lucas* categorical taking. They claim that because they own coal estates in the UFM area and are not permitted to mine that coal, all of their interest in the land has been taken. The Commonwealth Court implicitly agreed when it decided to use the coal estates within the UFM area as the property affected by the regulation. *Machipongo IV*, 719 A.2d at 29. That court explained that it used the coal estate because Pennsylvania recognizes three separate estates in the same piece of land: surface, coal/mineral, and support. It reasoned that because the estates in land may be separated for purposes of ownership, the coal estate could be separated from the whole to determine whether a taking had occurred.

As we have stated, though, the relevant parcel must be defined to include both the surface and mineral rights of the parties. We also have remanded the determination of the appropriate horizontal extent of the properties to the Commonwealth Court. Nevertheless, and notwithstanding the limited information available, we can perform the *Lucas*

analysis with regard to the Machipongo property and identify the relevant *Lucas* issues concerning the property of the Naughton/Erickson property owners.

To do so,we return to a consideration of the property owned by the Property Owners. Machipongo owns 373 acres in fee simple within the UFM area and 1000 acres outside of the UFM area. (R. 260). Within the UFM area, Machipongo owns surface rights as well as mineral rights. The regulation, therefore, does not "deprive . . . [it] of all economically beneficial" use of its property (*Lucas*, 505 U.S. at 1027) because Machipongo admits that it benefits from its surface rights by selling timber (R. 262a) and entering into leases for gas development. (R. 263a). Further evidence of the value of the Machipongo surface estate is clear from the record. Specifically, in 1994, in what Machipongo contends was a "forced sale", Machipongo received $60,000 for 35.93 acres of its property. (R. 47a). It, therefore, appears that if Machipongo sold the remaining 373 acres of undeveloped land within the UFM area, at the same price per acre as the 1994 sale, it would earn, in 1994 dollars, at least $622,878. Clearly, the regulation does not deny Machipongo "all economically beneficial" use of its property. Accordingly, we find that the regulation, as it relates to Machipongo, passes the *Lucas* test. *Lucas*, 505 U.S. at 1027.

Inconsistent factual information regarding the property of the Naughton/Erickson Property Owners requires us to remand the case for the *Lucas* analysis regarding their property. As far as we are able to determine, their property includes a coal estate of fifty-two acres within the UFM area and fee simple title to 1,150 acres and 250 acres of coal estate

situated outside of the UFM area. (R. 260a). Based on the briefs and the record, it appears that within the UFM area the Naughton/Erickson Property Owners own only coal estates and do not own surface rights in the UFM area. This would appear to distinguish them from the Machipongo Property Owners. However, contrary to that understanding, the Commonwealth Court refers to the Property Owners' surface rights in the UFM area. Specifically, it explains:

> Because we have determined that only the regulated land is to be considered in determining the denominator, **we must next determine how to treat [Property] Owners' coal estate in the UFM designated area. The Commonwealth suggests we should calculate the denominator based on finding [Property] Owners' rights in the coal estate are just part of the bundle of rights they own in land. If we were to do so, there would be no taking because [Property] Owners do not dispute that they still have surface rights that can be used and they would not be deprived of all economical beneficial use of their land.** If, however, we were to agree with [Property] Owners that it did not matter what other estates in land they owned because the coal estate was treated as a separate estate, then there would be a taking because they would be deprived of their right to mine that land.

Machipongo IV, 719 A.2d at 28 (emphasis added). Because we are unsure whether the Naughton/Erickson Property Owners own surface rights within the UFM area, and because

the Commonwealth Court has not yet defined the limits of the horizontal extent of the property of the Naughton/Erickson Property Owners, which may or may not be greater than the UFM area, we are unable to properly conduct a *Lucas* analysis with regard to them. We, therefore, remand the *Lucas* determination to the Commonwealth Court to render a decision consistent with this Opinion.

Traditional Takings Analysis

Because the regulation, as to Machipongo (and possibly to Naughton/Erickson Property Owners as well) survives *Lucas*, a traditional takings analysis must be performed. *See Palazzolo*, 121 S.Ct. at 2457. The traditional analysis focuses on several criteria designed to balance public interest against private rights. In *Penn Central*, the U.S. Supreme Court set forth the factors as follows:

> The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations[;[11]]

---

11. We note with approval that Justice O'Connor, in her *Palazzolo* Concurring Opinion, observed that an evaluation of the reasonableness of a claimant's investment-backed expectations should take into consideration whether the land owner owned the property on the effective date of the regulation as well as the "regulatory regime in place at the time the claimant acquires the property . . . [that is, the extent of previous government regulation of the area]." *Palazzolo*, 121 S.Ct. at 2466.

Consistent with the observation that the regulatory regime at the time the claimant acquires property is relevant to the inquiry, we have observed that: (Cont'd)

Appendix A

* * * *

> The character of the governmental action . . . [whether there is a] physical invasion . . . [or whether the regulation is reasonably related to the promotion of the general welfare; and,]
>
> * * * *
>
> [Whether] the health, safety, morals, or general welfare would be promoted by prohibiting particular contemplated uses of land.

Penn Central, 438 U.S. at 124, 125. It is the task of a court performing a traditional takings analysis to determine whether the regulation, based on the foregoing considerations, is unduly oppressive and forces "some people alone to bear public burdens which in all fairness and justice should be borne by the public as a whole." *Palazzolo*, 121 S.Ct. at 2458 (quoting *Armstrong v. United States*, 364 U.S. at 49 (1960)).

In the context of the summary judgment motion, the Commonwealth Court did not conduct a full *Penn Central*

(Cont'd)

> The Legislature has long regulated the quality of the waters in the Commonwealth. . . . In addition, . . . Congress, ha[s] . . . made extensive efforts to remove the pollution from our nation's waters.

National Wood Preservers, Inc. v. Commonwealth, 414 A.2d 37, 44 (1980) (citations omitted).

takings analysis. *Machipongo IV*, 719 A.2d at 29. Instead, it focused on the coal estates in the UFM area and relied predominantly on the takings equation. Indeed, the purpose of the trial was limited to the issue of whether the coal estates could be profitably mined. *Machipongo VI*, 719 A.2d at 25-26.

The U.S. Supreme Court determined that although the regulation at issue in *Palazzolo* did not rise to the level of a *Lucas* taking (because the property, when viewed as a whole, retained value), it remanded the case to the Rhode Island Supreme Court for a determination of whether a *Penn Central* taking had occurred. *Palazzolo*, 121 S.Ct. at 2457.[12] While some evidence relevant to the traditional takings analysis was adduced during the trial in the instant case, to determine whether the UFM area could be economically mined, the relevant facts were never presented to the Commonwealth Court for the purpose of conducting a traditional takings analysis. Subject to the issue of nuisance, which we address in the next section, we believe that the Commonwealth Court should conduct a trial to consider the facts relevant to the determination of whether the regulation is a taking pursuant to the traditional takings analysis.

Nuisance

The Commonwealth Court prevented the Commonwealth from presenting evidence regarding whether the proposed

12. Upon the U.S. Supreme Court's remand of the *Penn Central* takings analysis, the Rhode Island Supreme Court, in turn, remanded the case to its Superior Court to conduct the analysis. *Palazzolo v. State ex rel. Tavares*, 785 A.2d 561 (R.I. 2001).

use of the land would constitute a nuisance. *Machipongo V*, slip op. at 2. Notwithstanding that the Commonwealth Court recognized that "polluting the waters of the Commonwealth is a public nuisance[,]" it declined to consider the Commonwealth's evidence that the proposed use would constitute a nuisance. *Id.* at 7. The Commonwealth Court explained that the water was adequately protected by PaSMCRA regulations that require applicants for permits to show that there is no presumptive evidence that mining would pollute surrounding waters. *Id.* However, regardless of the protections offered in those regulations, there is nothing that prevents the state from enacting a law that makes explicit its right to prohibit activity, which would already be contrary to existing law. *See Lucas*, 505 U.S. at 1030.

Furthermore, it is clear that if a regulation prohibits behavior that could be abated or prohibited by general principles of state property law, there is no need for the state to provide compensation to prevent the use. *Id.* at 1027-1029. In *Lucas*, the U.S. Supreme Court explained that even where the regulation prohibits "all economically beneficial use of land," there is no taking if the use could be abated or prohibited by general principles of state property law. *Id.* at 1029. That is to state,

> [i]n light of our traditional resort to "existing rules or understandings that stem from an independent source such as state law" to define the range of interests that qualify for protection as "property" under the Fifth and Fourteenth Amendments, this recognition that the Takings Clause does not require compensation when an owner is barred

> from putting land to a use that is proscribed by those "existing rules or understandings" is surely unexceptional.

Id. at 1030 (internal citations omitted). In fact, the U.S. Supreme Court remanded *Lucas* to the South Carolina Supreme Court and directed it to determine whether, pursuant to state law, the prohibited use constituted a nuisance or violated state property law. *Id.*

The rules and understandings as to the uses of land that are acceptable and unacceptable have changed over time. The fact that sewage was once strewn into city streets does not give rise to a permanent reasonable expectation that such behavior can continue indefinitely. In another takings case, the U.S. Supreme Court explained this concept as follows:

> It is true, when the defendants . . . purchased or erected their breweries, the laws of the state did not forbid the manufacture of intoxicating liquors. But the state did not thereby give any assurance, or come under an obligation, that its legislation upon that subject would remain unchanged. Indeed, . . . the supervision of the public health and the public morals is a governmental power, continuing in its nature, and to be dealt with as the special exigencies of the moment may require; and that, for this purpose, the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself.

Mugler v. Kansas, 123 U.S. 623, 669 (1887) (internal citations and quotations omitted) (holding that a state statute that prohibited manufacture of alcoholic beverages was not a taking even though such manufacture was legal before the statute). While the owner of land might once have been permitted to mine his land without regard to the effect that it had on public streams, as evidenced by the spoilage of "11,000 miles of streams" in this country,[13] that expectation is, and has been for some time, no longer reasonable. Despite the fact that one may have purchased property with the expectation to use it in such a manner that was acceptable before the purchase, there may come a point in time when the original owner's expectations may no longer be reasonable.

The Commonwealth Court has repeatedly applied *Section* 821B of the Restatement (Second) of Torts to guide its determinations as to whether a use of property constitutes a public nuisance. *See, e.g.*, *Muehlieb v. City of Philadelphia*, 574 A.2d 1208 (Pa. Cmwlth. 1990). That Restatement section provides as follows:

> (1) A public nuisance is an unreasonable interference with a right common to the general public.
>
> (2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:

---

13. *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264, 279-280 (1981) (quoting 1976 & 1977 U.S. House of Representatives reports, discussed *infra.*)

Appendix A

> (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
>
> (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or
>
> (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

Restatement (Second) of Torts § 821B. Therefore, the issue is whether the proposed mining would unreasonably interfere with a right of the general public.

Reasonableness is essentially a factual inquiry, which we will not address, but whether there is public right, is an issue of law. This Court has expressly held that the public has a right not to suffer acid mine discharge into its public waters, and that such discharges constitute a public nuisance as a matter of statutory and common law. *Commonwealth v. Barnes & Tucker Co.*, 319 A.2d 871, 880 (1974) (*Barnes & Tucker I*). In *Barnes & Tucker I*, we reversed a decision of the Commonwealth Court that rejected the Commonwealth's nuisance causes of action. We held that common law authorized the abatement of acid mine drainage that pollutes

public waters. *Id.* at 881-882. We also observed that The Clean Stream Law, 35 P.S. § 691.1 et seq., provides a statutory basis for the finding that acid mine discharge may rise to the level of a public nuisance.

> The discharge of sewage or industrial waste or any substance into the waters of this Commonwealth, which causes or contributes to pollution as herein defined or creates a danger of such pollution is hereby declared not to be a reasonable or natural use of such waters, to be against public policy and to be a public nuisance.

Barnes & Tucker I, 319 A.2d at 880 (quoting section 3 of The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. § 691.3). In reaching that conclusion, we relied on *Pennsylvania R.R. Co. v. Sagamore Coal Co.*, 126 A. 386 (1924), where we granted an injunction to prevent mine owners from discharging acid mine water into a stream used by the railroad and the public as a water supply. *Id.* at 387. We stated: "[i]t has always been under our law, a nuisance to pollute a stream from which the public gets its supply of water." *Id.* at 391. The General Assembly's definition of pollution, although circular for our purposes in that it uses the word nuisance, provides useful guidance. Section 1 of The Clean Streams Law, 35 P.S. § 691.1. The Section defines pollution as follows:

> **"Pollution"** shall be construed to mean contamination of any waters of the Commonwealth such as will create or is likely to create a nuisance or to render such waters harmful,

> detrimental or injurious to public health, safety or welfare, or to domestic, municipal, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life, including but not limited to such contamination by alteration of the physical, chemical or biological properties of such waters, or change in temperature, taste, color or odor thereof, or the discharge of any liquid, gaseous, radioactive, solid or other substances into such waters. . . .

35 P.S. § 691.1.

There is further statutory support for a finding that it is against the law of this Commonwealth and a nuisance to pollute public waters in section 401 of the Clean Streams Law, 35 P.S. § 691.401, which provides that:

> It shall be unlawful for any person or municipality to put or place into any of the waters of the Commonwealth, or allow or permit to be discharged from property owned or occupied by such person or municipality into any of the waters of the Commonwealth, any substance of any kind or character resulting in pollution as herein defined. Any such discharge is hereby declared to be a nuisance.

In *Barnes & Tucker I*, we repeated that "corruption of water which affects the public use of a stream or menaces the public

health becomes a public nuisance which the Commonwealth may seek to abate." *Barnes & Tucker I*, 319 A.2d at 882.[14]

The Commonwealth Court, therefore, incorrectly held that there was no authority that would permit the Commonwealth to prohibit a property owner from mining just because it would destroy the population of trout in Goss Run. *Machipongo V*, slip op. at 7. While the Commonwealth contends that mining would, in addition to destroying the trout population, adversely affect the use of the stream as a water supply (R.3a) the nature of the public use of the water should not be the focus of our inquiry. To the contrary, we have explained that "we believe that the public has a sufficient interest in clean streams alone regardless of any specific use thereof . . . [to warrant] injunctive relief." *Barnes & Tucker I*, 319 A.2d at 882 (preserving the water from acid mine runoff despite the fact that the only use of the water was recreational). Accordingly, if the Commonwealth is able to show that the Property Owners' proposed use of the stream would unreasonably interfere with the public right to unpolluted water, the use, as a nuisance, may be prohibited without compensation.

---

14. Similarly, upon our review of the Commonwealth Court's abatement order we held,

> [G]iven our determination that the Commonwealth is validly employing its police power in a reasonable manner to abate the immediate public nuisance, there can be no finding of an unconstitutional "taking" by the imposition of the present abatement order. . . .

Commonwealth v. Barnes & Tucker Co., 371 A.2d 461, 467 (1977) (*Barnes & Tucker II*).

Appendix A

Property Owners correctly point out that in the past we have held that if a nuisance is only anticipated and not a nuisance *per se*, the party seeking to prevent the use must show that the nuisance is "practically certain [to occur], not merely probable." *Ranck v. Bonal Enterprises, Inc.*, 359 A.2d 748, 752 (Pa. 1976). However, although mining is not a nuisance *per se*, pollution of public waterways is. The key to protecting our water is to prevent pollution from occurring. The General Assembly has expressly stated that not only is its desire to restore polluted waters but "[i]t is the objective of the Clean Streams Law . . . to **prevent** further pollution of the waters of the Commonwealth." 35 P.S. § 691.4(3) (emphasis added). It is beyond dispute that the resources needed to correct pollution once it has occurred are far greater than those needed to prevent it. While it is true that mining *per se* is not a nuisance, experts need not wait until acid mine water flows out of mines in the UFM area to predict the likely results of mining this land. If the Property Owners are correct that additional mining would not pollute the Watershed, then there is no nuisance. Then again, if the Commonwealth can prove that mining the UFM area would pollute Goss Run, the cause of the nuisance can be prohibited. We see no reason to require the Commonwealth to prove that the alleged pollution is practically certain to occur. It is enough if the Commonwealth can prove what its technical study found, that further mining in the UFM area had a "high potential to cause increases in dissolved solid and metal concentrations in Goss Run that would adversely affect the use of the stream as an auxiliary water supply" or had "a significant potential to disrupt the hydrologic balance causing decreases in the net alkalinity of discharges . . . and destroying the habitat for wild trout populations." *Machipongo VI*, slip op. at 3.

Therefore, we remand this case to the Commonwealth Court to consider evidence that the proposed use would constitute a nuisance. If, after a factual inquiry that court determines that the Property Owners' activities would unreasonably interfere with the public right to unpolluted water, the ruling of the court based upon decisions of this Court and the U.S. Supreme Court should be clear. *Lucas*, 505 U.S. at 1027-1029; *Barnes & Tucker I*, 319 A.2d at 881-882. The government is not required to pay Property Owners to refrain from taking action on their land that would have the effect of polluting public waters. Indeed, despite our conviction that private property rights are to be strongly protected, we are struck by the impropriety of taking action that would require the General Assembly to pay someone not to pollute public water or destroy public fisheries.

Conclusion

We, therefore, reverse the Commonwealth Court's determination that a taking occurred and remand this case to the Commonwealth Court to: (1) horizontally define the relevant property: (2) conduct the *Lucas* analysis with regard to the property of the Naughton/Erickson Property Owners; (3) conduct the *Penn Central* analysis with regard to the property of both Property Owners; and, if necessary, (4) determine whether the proposed use would constitute a nuisance or would otherwise violate state property law.

We do accept, however, the Commonwealth Court's determination that property without value cannot be taken. The Commonwealth Court considered detailed scientific evidence of the economic viability of mining coal in the UFM

area and determined that "the Machipongo Surface Mine . . . [was] not economically feasible." Machipongo VI, slip op. at 38. Therefore, the Commonwealth Court declined to find a taking with regard to the Machipongo Surface Mine. The Commonwealth Court's legal reasoning on this issue is sound and there is no basis here to alter its factual findings. Accordingly, the Property Owners are not entitled to compensation with regard to the Machipongo Surface Mine.

Finally, Property Owners have requested that we identify the appropriate forum for a hearing on damages. However, because we have reversed the determination of the Commonwealth Court that a taking occurred and because it is not clear, at this juncture, whether a taking will be found, we decline to render an advisory opinion as to the appropriate forum to consider damages.

Former Chief Justice Flaherty did not participate in the decision of this case.

JUDGMENT ENTERED:
May 30, 2002

s/ Shirley Bailey
Shirley Bailey,
Chief Clerk

APPENDIX B — NOTICE OF THE COMMONWEALTH COURT OF PENNSYLVANIA DATED OCTOBER 19, 2000

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 248 M.D. 1992

MACHIPONGO LAND AND COAL COMPANY, INC. and the VICTOR E. ERICKSON TRUST and JOSEPH NAUGHTON,

Petitioners

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES, THE ENVIRONMENTAL QUALITY BOARD, and ARTHUR A. DAVIS, SECRETARY OF ENVIRONMENTAL RESOURCES,

Respondents

NOTICE

NOW, October 19, 2000, pursuant to a praecipe for entry of final judgment and decree filed in the above matter, this court's adjudication and decree nisi of August 21, 2000 as modified by the order of September 25, 2000 is hereby entered as a final judgment of the court.

s/ C.R. Hostutler
C.R. Hostutler
Deputy Prothonotary/Chief Clerk

APPENDIX C — ORDER OF THE COMMONWEALTH COURT OF PENNSYLVANIA DATED SEPTEMBER 25, 2000

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NO. 248 M.D. 1992

MACHIPONGO LAND AND COAL COMPANY, INC. and the VICTOR E. ERICKSON TRUST and JOSEPH NAUGHTON,

Petitioners

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES, the ENVIRONMENTAL QUALITY BOARD and ARTHUR A. DAVIS, Secretary of ENVIRONMENTAL RESOURCES,

Respondents

ORDER

AND NOW, this 25th day of September, 2000, upon consideration of both Petitioners' and Respondents' Motions for Post-Trial Relief, the following changes are made to our Adjudication and Decree Nisi issued August 21, 2000:

1. The amount of coal that Thaddeus Sobek, Respondents expert testified as the amount of recoverable coal for the Middle Kittanning

Seam at the proposed Erickson/Naughton Surface mine is 39,000 tons, not the 49,000 tons listed in the opinion. This change does not change the finding that the coal at this site is mineable.

2. David Cerulla's testimony is that the Middle Kittanning coal seam at the Machipongo Surface Mine is 36 inches in width, not the thirty inches set forth in the Adjudication and Decree Nisi. The Commonwealth's witness is more credible on this issue and the finding remains that the average size of the coal seam is thirty inches.

All of the other Post-Trial Motions filed by Petitioners and Respondents are denied.

s/ Dan Pellegrini
DAN PELLEGRINI, Judge

APPENDIX D — ADJUDICATION AND DECREE NISI AND ORDER OF THE COMMONWEALTH COURT OF PENNSYLVANIA DATED AUGUST 21, 2000

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NO. 248 M.D. 1992

MACHIPONGO LAND AND COAL COMPANY, INC. and the VICTOR E. ERICKSON TRUST and JOSEPH NAUGHTON,

Petitioners

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES, the ENVIRONMENTAL QUALITY BOARD and ARTHUR A. DAVIS, Secretary of ENVIRONMENTAL RESOURCES,

Respondents

BEFORE: HONORABLE DAN PELLEGRINI, Judge

ADJUDICATION AND DECREE NISI

Machipongo Land and Coal Company, Inc., the Victor E. Erickson Trust (Erickson) and Joseph Naughton (collectively, Coal Owners), instituted this action in 1992 against the Commonwealth of Pennsylvania, Department of Environmental Resources (DER), the Environmental Quality Board (EQB) and Arthur A. Davis, Secretary of the

Department of Environmental Resources (collectively, the Commonwealth) claiming that the Commonwealth had "taken" their interest in coal underlying their property in the Goss Run Watershed (Watershed) by designating those lands "unsuitable for mining"[1] under the Pennsylvania Surface Mining Conservation and Reclamation Act (PaSMCRA), Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. § 1396.4e(g).

On May 26, 1989, the Commonwealth received from the Brisbin Recreation Board and the Locust Grove Sportsmen Club a "Petition To Declare Areas Unsuitable For Mining" in which they requested that the entire 2.86 square mile Watershed be protected from coal mining so as to protect the quality of the water of the Goss Run Stream and the Brisbin Dam and Recreational Park.[2] Coal Owners requested and were granted intervenor status because they owned surface and mineral rights in the Watershed that could potentially be affected. Specifically, Machipongo owned 2,037 acres of land in Clearfield County of which 157 acres had mineral rights in the Watershed, and Erickson and Naughton owned 1,350 acres in Clearfield County of which 27 acres had mineral rights in the Watershed.

---

1. 25 Pa. Code § 86.130(b)(14), which took effect May 23, 1992, designated their land as unsuitable for mining.

2. More specifically, the petition alleged that surface mining within the Watershed would adversely affect the Goss Run stream water quality and the Brisbin Dam and Recreational Park; would adversely affect a recreational stocked trout fishery maintained by the Pennsylvania Game Commission; and would adversely affect wildlife habitat in the Watershed reducing its values for hunters, hikers and others who used the Watershed because of its aesthetic woodlands.

Appendix D

After public hearings were held, the DER conducted a detailed study of the proposed designated area as required by Section 4.5(g) of the PaSMCRA, 52 P.S. § 1396.4e(g). Essentially, the results of the study indicated that surface coal mining of the Watershed, upstream of the Brisbin Dam, had significant potential to disrupt the hydrologic balance causing decreases in the net alkalinity of discharges from abandoned Lower Freeport underground mines and destroying the habitat for wild trout populations. It also had a high potential to cause increases in dissolved solid and metal concentrations in Goss Run that would adversely affect the use of the stream as an auxiliary water supply. The DER recommended that the EQB approve a proposed regulation designating the surface mineable coals located within the Watershed upstream of the Brisbin Dam as unsuitable for surface mining of coal and submitted that recommendation to the General Assembly. The EQB approved the proposed regulation, and after a period of public comment, the General Assembly also approved the notice of proposed rulemaking and adopted a final regulation designating a portion of the Watershed unsuitable for mining (UFM) as set forth at 25 Pa. Code § 86.130(h)(14).[3] That designation was made pursuant to Section 4.5(b) of the

---

3. That section provides:

> The surface mineable coal reserves within the Goss Run Watershed upstream of the Brisbin Dam, including a small tract of land within the Watershed of the West Tributary to Goss Run, a total of approximately 555 acres, are designated unsuitable for all types of surface mining operations.

The regulation was published as final in the Pennsylvania Bulletin on May 3, 1992. *See* 22 Pa. Bull. 2715.

PaSMCRA, 52 P.S. § 1396-4e(b), which permits the Commonwealth to designate an area as unsuitable for surface mining. If underground mining was proposed, none of the mine opening, including ventilation shafts, could be located within the designated area.

Subsequently, on July 1, 1992, Coal Owners filed a petition for review against the Commonwealth in our original jurisdiction seeking equitable and declaratory relief challenging the regulation designating that certain portions of land they owned in the Watershed were unsuitable for surface mining. They alleged that 157 acres of the 2,037 acres of land owned by Machipongo in the south reserves of the Watershed had mineral rights that were within the UFM designated area and could not be mined, resulting in a taking of at least 1,344,800 tons of its coal valued at $2,846,550. Similarly, 27 acres of the 1,350 acres owned by Erickson and Naughton in the north reserves of the Watershed could not be mined, resulting in a taking of at least 377,900 tons of their coal valued at $566,850. Based on Coal Owners' inability to mine any of their coal located within the UFM-designated area, they alleged that the regulation implementing the designation constituted a taking without just compensation and a violation of their due process rights. They requested, among other things, that this Court enjoin the enforcement of the regulation as an unconstitutional taking of their property or remand the case to the trial court to determine the value of the property taken as a result of the adoption of the regulation.[4]

---

4. Coal Owners also requested that we order the Commonwealth to adopt regulations containing constitutional safeguards for affected landowners and to declare the regulation void, or order the (Cont'd)

Appendix D

After much litigation as to the proper forum to hear this case, our Supreme Court remanded it to us for resolution.[5]

(Cont'd)
Commonwealth to hold a hearing with constitutional guarantees to determine whether the regulation should be adopted.

5. In response to Coal Owners' petition, the Commonwealth filed preliminary objections alleging, *inter alia*, that this Court lacked jurisdiction to hear the case. While holding that we had jurisdiction, we granted the preliminary objections and transferred the matter to the Environmental Hearing Board (EHB) for disposition under the doctrine of primary jurisdiction because it had the expertise to rule on the validity of the surface mining taking claims. *See Machipongo Land and Coal Co., Inc. v. Commonwealth, Department of Environmental Resources*, 624 A.2d 742 (Pa. Cmwlth. 1993) (*Machipongo I*).

Both the Commonwealth and Coal Owners filed appeals with the Supreme Court arguing that the transfer of the case to the EHB was erroneous. Coal Owners argued that their taking claims should be addressed by the courts while the Commonwealth argued they should be addressed by the DER. By order dated October 11, 1994, the Supreme Court reversed our decision and referred the case to the Court of Common Pleas of Clearfield County for further proceedings under the Eminent Domain Code, Act of June 22, 1964, Special Sess., P.L. 84, *as amended*, 26 P.S. §§ 1-101 - 1-903. *See Machipongo Land and Coal Co., Inc. v. Commonwealth, Department of Environmental Resources*, 538 Pa. 361, 648 A.2d 767 (1994) (*Machipongo II*). The Commonwealth filed an application for reargument alleging that this Court, rather than the trial court, had jurisdiction to hear this matter. The Supreme Court granted reargument and by order dated May 21, 1996, vacated its earlier decision. *See Machipongo Land and Coal Co., Inc. v. Commonwealth, Department of Environmental Resources*, 544 Pa. 271, 676 A.2d 199 (1996) (*Machipongo III*). It then remanded the case to this Court for further proceedings on the basis that the

(Cont'd)

Appendix D

The Commonwealth filed a motion for summary judgment which was denied by this Court in *Machipongo Land and Coal Company v. Department of Environmental Resources*, 719 A.2d 19 (Pa. Cmwlth. 1998) (*Machipongo IV*). There we denominated the following factors would have to be considered to determine whether a regulatory taking had occurred:

- whether the public interest requires regulatory interference with the property right;
- whether the regulation is reasonably related to that goal;
- whether the amount of property taken deprives an owner of all economical viable uses of the property, measured by what was taken (the numerator) against what was left (the denominator); and
- whether property owner's actions or proposed actions would cause a nuisance.

See Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

(Cont'd)
regulation upon which the Coal Owners were making their challenges was promulgated under the Commonwealth's police power rather than the Eminent Domain Code and did not fall within an enumerated exception to Section 761(a)(1) of the Judicial Code, 42 Pa. C.S. § 761(a)(1).

Appendix D

In order to address the third factor listed above, in the fraction of property lost to property unaffected, we were forced to define the relevant property interest. In *Machipongo IV*, we established a modified regulated land test to define that interest. Under our test, whether the regulated land will actually be the denominator depends on the answers to the following three questions:

1) whether the regulated land had value prior to the regulation;

2) whether the regulated land has a separate use from the non-regulated contiguous parcel(s) — i.e., whether it may be profitably used if it is the only parcel; and

3) if the regulated land has value separate from the contiguous land, whether all of its economic benefit is gone.

719 A.2d at 28. "If the regulated land had an economically viable use separate and apart from any other contiguous land that was owned and became valueless after the regulation, it would become the denominator in the fraction and there would be a taking." *Id.* The following fraction would ultimately determine whether a taking had occurred:

$$\frac{\textit{the interest in the coal taken (numerator)}}{\textit{the regulated land (denominator)}}$$

We stated that, "[i]f the result of the fraction is 1, then a taking has occurred; conversely if the fraction is anything less than 1, no compensatory taking has occurred." *Id.* at 29.

Appendix D

We then went on to address what was the appropriate denominator to be used when it was alleged that the property taken was coal. Because Pennsylvania law recognizes three separate estates in land (surface, coal/mineral and the right to support), we concluded that "the appropriate denominator by which to determine whether Coal Owners have lost all viable economic use of their land is solely the coal estate in the UFM-designated area." *Id.* To find that a taking of the coal estate had occurred, a finding had to be made that:

> The coal estate had value prior to the UFM designation, whether it had a separate use from the non-regulated contiguous land Coal Owners owned, and whether all of its economic benefit was gone as a result of the regulation. If, after that determination is made, the result of the fraction is less than 1, then a taking has not occurred. In this case, *specific evidence would have to be adduced* as to whether the coal can be extracted by subsurface mining; whether the land in the regulated area cannot be surface mined without using the contiguous parcel; and whether the grade of coal is insufficient in amount or quality to economically mine. With that evidence, the denominator can be fixed and we can then determine whether the regulation has resulted in an unconstitutional taking . . .

Id. (Emphasis added.) To strike down the regulation, the Coal Owners then had to prove that their coal reserves were economically mineable.

Appendix D

After we issued our opinion in *Machipongo IV*, the Commonwealth filed a "motion in limine" seeking permission to introduce evidence at trial that Coal Owners' proposed mining activities would constitute a public nuisance. In making this nuisance-related argument, the Commonwealth invoked the so-called *Lucas* nuisance exception. This exception was recognized by the Supreme Court when it held that if the regulation prohibited the use under nuisance law, there would be no taking even if it had the effect of totally depriving the landowner of all beneficial use because the public's interest prevailed regardless of what the landowner had lost. *See Lucas*, 505 U.S. at 1029-30. The Commonwealth contended that any coal mining could be considered a nuisance. In rejecting that argument, we held that the type of nuisance envisioned in *Lucas* was not coal mining, which has never been declared a nuisance under Pennsylvania law, even though mining activity could potentially harm recreational fishing or a natural fishery. We established a standard that the Commonwealth was required to show that "Coal Owners would be denied a permit to mine under the Surface Mining Act or the regulations promulgated thereunder."

I.

THE GOSS RUN WATERSHED

Goss Run Watershed is located in Clearfield County. It is a high-quality stream and enters Brisbin Dam, a 2.5-acre manmade impoundment located within a 14-acre public park owned by the Borough of Brisbin. The public park and Brisbin Dam are used for various recreational purposes

including the stocking of trout for fishing. Various abandoned underground mines have been identified in the area, and discharge from these mines form a significant portion of the water flow of Goss Run. This discharge has a high pH value contributing to Goss Run's high quality water, and, ironically, concern about maintaining that discharge was one of the major reasons for the UFM designation for Goss Run.

There are five seams of coal that are present in the Watershed area in varying thicknesses. Beginning with the top seam and working down, these are known as the Upper Freeport ("E seam"), Lower Freeport ("D seam"), Upper Kittanning ("C prime seam"), Middle Kittanning ("C seam") and Lower Kittanning ("B seam"). Because some mining had already taken place in this area, the retrievable Lower Freeport coal often takes the form of "stumps" (i.e., pillars of coal left by former deep mine operators to support the roof of the seam).[6]

While these coal seams are present in the Watershed, they are not present in all properties within the Watershed either because they never existed or have been previously mined. One of the primary methods of determining the presence and extent of coal seams is through bore holes drilled into the earth which extract a vertical column of strata and reveal the thickness of the present coal seam and the related amount of "overburden" (the rock and strata that overlay a given coal seam) and "interburden" (the rock between any two coal seams). Bore hole data from drillings

6. Coal Owners, however, claim small acreages of intact Lower Freeport coal in the Proposed Erickson/Naughton Surface Mine and the Proposed Machipongo Surface Mine. *See infra*. n.6.

by surrounding mining operations and other drillers whose data accompany various studies are collected and analyzed. Another method to predict seam presence is to obtain channel samples from existing highwalls (the pit face) in adjacent surface mines.[7]

Once the data is collected, whether the coal can economically be mined is determined by the size of the reserve, the quality of the coal, the method of mining, the cost of extraction and the price for which the coal can be sold. With respect to surface-mined coal, seam thickness and the amount of overburden comprise the primary factor known as "overburden ratio." In addition, the recovery rate, which is the amount of coal within a seam together with waste in the seam, is important to an economic assessment. The current market supports mining with an over-burden ratio of roughly 30:1 and below (i.e., "30 feet of overburden for every one foot of coal that can be recovered"). Coal quality is also an important factor in any economic analysis. Excellent to good quality coal consists of low ash (a reading below 10%) and low sulfur (1 percent and below).

As accessing coal by underground mining, the economic viability of an underground mine is not only determined by

---

7. The existence of coal reserves based on the location and number of bore holes or channel samples is known as the "Coal Reserve Classification." Under that classification system, coal reserves are classified as either proven, probable or possible. A "proven" reserve is an in-depth study where there is enough drilling and exploration at the proposed mine location to warrant a major capital expenditure. "Probable" is based on the geology of the area with one or two bore holes near the proposed reserves confirming the geology.

coal quality, but by the cost of accessing the coal and the ability to amortize the openings and supporting structures because if geologic faults are present, they limit the amount of coal that can be mined because the mining of coal cannot take place across a fault because the coal is not at the same elevation. In the Goss Run area, there are two faults present which act as barriers to underground mining: the Brisban Fault, which runs roughly southeast to northwest and directly below the southwest border of the UFM designated area, and the Parsonville Fault, which runs through the UFM area in roughly an east to west direction. Because one can't mine through a fault, it limits where a mine opening can be placed.

Three existing mines are operated by A1 Hamilton Contracting Company (Al Hamilton), a subsidiary of the Bradford Coal Company in or near the Goss Run UFM. Two existing surface mines, the "Bonita job" and the "Cowfer job", operate in the Watershed because they were exempted from the UFM designation. *See* 25 Pa. Code § 86.130(b)(14). Recent mining on the Cowfer job has been in the Upper Freeport, Lower Freeport, Upper Kittanning and Middle Kittanning coal seams. The other surface mine, known as the "Erickson/Hamilton job," is located outside the Watershed but only approximately 600 feet from the UFM boundary. Mining on that job is currently in the Lower Freeport, Upper Kittanning and Middle Kittanning coal seams. The permit allows extraction of Upper Freeport coal, but this seam has not yet been encountered. During the recent coal market slow down, Al Hamilton idled all of its operations except the Erickson/Hamilton job; the coal from this job was under production and met the specifications for existing contracts and remained economical to mine.

Appendix D

Coal Owners have asserted takings claims of their coal rights for three separate and distinct areas within the Goss Run UFM-designated area that could economically either be surface or underground mined. They are:

- **Erickson Surface Reserves**. A 27-acre area west of the Bonita Surface Mining Pit.[8]

- **Machipongo Surface Reserves**. A 35-acre area within the Watershed east of Goss Run and southeast of the Bonita SMP.[9]

- **Machipongo Underground Reserves**. A 96-acre area west of Goss Run within the Goss Run UFM designation (hereinafter Machipongo underground reserves). In connection with its taking claim for its Machipongo underground reserves Machipongo asserts a claim for an additional 23-acre area immediately adjacent to the Goss Run UFM designation (Machipongo "contiguous parcel" structurally and

8. The proposed Erickson surface reserves are identified on a series of four of Petitioners' map overlays for the Upper Freeport, Lower Freeport, Upper Kittanning and Middle Kittanning coal seams. (Exhibits S-40A as overlain by Exhibits S-40D, S-40E, S-40F and S-40G).

9. The proposed Machipongo surface reserves are identified on a series of three of Petitioners' map overlays for the Freeport, Upper Kittanning and Middle Kittanning coal seams. (Exhibits S-40A as overlain by Exhibits S-40E, S-40F and S-40G).

hydrologically connected coal reserves). The Machipongo underground reserves and the Machipongo structurally and hydrologically connected coals are identified on two maps of Petitioners' map overlays. (Exhibits S-40A as overlain by Exhibits S-40H and S-40I.)

At issue in this case is whether there is sufficient mineable coal, in amount and quality, for Coal Owners to economically mine each of those reserves. If any or all of the reserves are economically mineable, then the UFM designation for that portion of the coal reserves deemed mineable will be stricken. Because there are different property owners and three separate and distinct takings claims, each claim will be evaluated separately.

Coal Owners initially called David Cerulla (Cerulla), a consultant for A1 Hamilton Coal Co., the operator of the Erickson and Bonita surface mine, and James Rogerson (Rogerson), executive vice president of Bradford Coal, the parent of A1 Hamilton Coal Co., to testify concerning the quality of the coal and the feasibility of mining the proposed Erickson/Naughton and Machipongo surface mines. Both testified that the coal quality of both mines was excellent — low sulfur and coal and a high natural pH. Rogerson testified that while the price of coal was low, one of the few mines that was operating was the Erickson Mine because of the quality of the coal from that mine.

The Commonwealth also called fact witnesses. Milt McCommons, a hydrologist, testified that he visited the area, including the Erickson and Bonita Surface mines,

reviewed various reports and drill logs, and testified as to what his observations as to the thickness of the coal and the typography of the coal that he observed from his visits.

As usual in these cases, the parties relied on experts to determine whether the coal was economically mineable. The Coal Owners built their case around mining proposals designed by their experts, John G. Foreman and John W. Foreman, for each of the above-described reserves. John G. Foreman is a geologist and owner of U.S. Environmental Research Service, a firm that prepares mining permits as well as assists miners in operation of their coal mines. He has also worked as a subsurface miner. John W. Foreman, John G.'s father, has over 50 years experience in coal and clay mining, both in mine management and in a mining consulting firm where he was a principle. To establish that the proposed mines were not economically viable, the Commonwealth offered the testimony of Thaddeus J. Sobek (Sobek), also a geologist who has extensive experience as a senior manager with John T. Boyd Company, a mining consulting firm with a worldwide clientele.[10]

---

10. The Commonwealth also called Joel Koricich, a senior engineer with the Department of Environmental Protection, who testified about the feasibility of subsurface mining of the Machipongo underground site from outside the UFM; William R. Winters testified that the barrier around the Machipongo subsurface mine was not sufficient to prevent a breakout of the underground water, and that the water coming out of the mine would be polluted. Hobert Baker, a DER pollution biologist, testified as to the effect mining would have on Goss Run.

Appendix D

II.

Surface Mines

A. Erickson/Naughton Surface Mine

Both John G. Foreman and Sobek agreed that there are four coal seams present at the Erickson/Naughton Site.[11] John G. Foreman estimated the mineable coal by seam as: 27 acres of Upper Freeport coal averaging 1.95 feet in thickness; 5 acres of Lower Freeport coal averaging 4.02 feet in thickness; 27 acres of Upper Kittanning coal averaging 2.27 feet in thickness; and 27 acres of Middle Kittanning coal averaging 3.12 feet in thickness. He testified that the overburden ratio to mine this coal was 30:1. He estimated a recovery rate of coal at 90% based in part on Cerulla's testimony that the recovery rates from the Upper and Middle Kittanning coal seams at the adjacent Erickson/Hamilton mine was in the low to mid 90% range with a overburden ratio of 33:1. He also testified that the most efficient manner to mine the coal was when market conditions allowed resumed mining at the Bonita job, and to continue block

11. For the first time at trial, the Commonwealth, in effect, contended that the claim brought by the Victor E. Erickson Trust that the UFM designation was unconstitutional could not be made because it no longer owned the property as those interests were conveyed to the Erickson Family Trust, a trust composed of residuary benefits of the Victor E. Erickson Trust. It contends that the right of compensation for a taking is a personal right that does not pass to a successor with a transfer of land. Even if that is true, the right of compensation is not at issue here, only whether the effect of the regulation is an unconstitutional taking.

cutting straight through into the Erickson/Naughton site as a continuation of that job. In any event, he stated that site could be developed profitably as a stand-alone mine.

The Commonwealth's expert, Sobek, also testified that there were seams of coal but differed in his opinion as to the thickness of the Upper Kittanning coal seam which he said had a thickness of 2.10 feet and the Lower Kittanning coal seam which he said had a thickness of 2.50 feet instead of Foreman's estimates of 2.27 and 3.00, respectively. The other main difference was that he estimated the recovery rate of coal mined out of those seams to be 85% rather than 90% as Foreman testified.

Based on their respective estimates, the total amount (in tons) of economically feasible recoverable coal at the proposed Erickson Naughton Surface Mine is as follows:

Seam	**Foreman**	**Sobek**
Upper Freeport	85,300	81,000
Lower Freeport	52,100	49,000
Upper Kittanning	90,500	87,000
Middle Kittanning	131,200	104,000
Total Coal Tons	**359,100**	**321,000**

B. Machipongo Surface Mine

Both John G. Foreman and Sobek agreed that there are three coal seams at the Machipongo site. John G. Foreman testified that there are 11 acres of Lower Freeport with an average thickness of 4.5 feet; 35 acres of Upper Kittanning with an average thickness of 1.74 feet; and 35 acres of Middle

Kittanning with an average thickness of 3.12 feet. He predicted an overburden ratio varying between 13:1 and 17:1 and again predicted a recovery rate of 90%. John G. Foreman also testified that it, too, could be developed as a stand-alone mine but a more economical way to access the proposed mine would be to enter from the Cowfer job to the west.

Sobek again testified that, based on his experience, he believed that 85% of the amount of coal in the seams would be recovered, not the 90% used by Foreman. While agreeing with the amount of acres of each seam as well as the thickness of the coal seam for the Lower Freeport and Upper Kittanning seams, he testified that the thickness of the coal was only 2.5 feet rather than the average thickness 3.12 testified to by John W. Foreman.

Based on their respective estimates, the total amount (in tons) of economically feasible recoverable coal at the proposed Machipongo Surface Mine is as follows:

Seam	**Foreman**	**Sobek**
Lower Freeport	80,200	42,000
Upper Kittanning	98,700	93,900
Middle Kittanning	176,900	134,000
Total Coal Tons	**355,800**	**269,000**

Because John G. Foreman testified that, based on his estimates of the thickness of the coal seam and the amount of overburden, the coal can be profitably mined, while Sobek, based on his estimates, testified that it cannot, the outcome of this case is determined by which estimates or parts of

estimates made by the respective parties' expert is accepted as more credible than the other.

To discredit John G. Foreman's testimony, the Commonwealth argued that his 30:1 "overburden ratio" or "stripping ratio" necessary to economically mine coal should not be accepted because:

- there is no Lower-Freeport coal in either the proposed Erickson/Naughton Surface Mine or Machipongo Surface Mine;

- there is no Upper Freeport coal contained on the Erickson/Naughton site;

- his estimate of the thickness of the Middle Kittanning coal seam of 3 feet is not supported by the evidence;

- there are errors in his recovery rate;

- and the inaccessibility of the proposed surface mines make them uneconomical to mine.

C. Surface Mine Findings

1. Recovery rate

The Commonwealth contends that the use of the 90% recovery rate used by John W. Foreman is not credible because in the 1985 coal estate prepared for the Erickson Trust valuation, he used an 85% recovery rate. However, as Coal Owners point out, Cerulla, in charge of operations for

the Erickson/Hamilton SMP, testified that on that job there was a recovery rate of 90 to 95%. Even though his 1985 valuation only used an 85% recovery rate, John G. Foreman changed that estimate to 90% based on experience of a higher recovery rate at the adjacent Erickson mine. Based on the coal recovery rate at the adjoining Erickson/Hamilton SMP, I find Foreman's 90% recovery rate more credible than the 85% recovery rate used by Sobek.

2. The presence of Lower Freeport Coal at both Proposed SMP's

a. Erickson/Naughton Proposed SMP

The Commonwealth contends that John G. Foreman's stripping ratio should not be accepted because it assumes that Lower Freeport coal seam, with a 4.02 foot thickness, exists when it is not present on 19 acres out of the 27 acres of the proposed Erickson/Naughton surface mine. Despite the Commonwealth's contention, there is not a significant dispute between their respective experts as to the amount of Lower Freeport coal at the Erickson/Naughton proposed surface mine. John G. Foreman testified that there were 52,100 feet while the Department's expert found that there was 49,000 feet, almost identical once corrected for the 85% recovery rate that Sobek advanced. For purposes of calculation, we will use John G. Foreman's estimate of 52,100 tons in calculating the amount of recoverable coal at the Lower Freeport seam for the Erickson/Naughton mine.

Appendix D

b. Machipongo Proposed SMP

While there was virtually no difference in estimates between the expert witnesses of the amount of Lower Freeport coal at Erickson/Naughton, there was a substantial difference in estimates for the Machipongo proposed surface mine. John G. Foreman estimated 80,200 tons while Sobek only estimated 42,000 tons of Lower Freeport coal. The Commonwealth claims that the difference lies in John G. Foreman's stripping ratio which mistakenly assumes a 4.5 foot thickness of Lower Freeport coal based on an 11-acre solid block of coal existing on the Machipongo site rather than just stumps and pillars.

The Commonwealth makes this contention because the Lower Freeport seam outcrops, i.e., comes to the surface and ends within the Machipongo site. When a seam outcrops, it argues there can be no Lower Freeport seam on that portion of the property after the outcropping because obviously there can be no coal where there is no coal seam. Moreover, it contends that no solid block of Lower Freeport coal is in the other portion of the site because it has been heavily deep mined and only stumps and pillars of Lower Freeport remain. It points out that testimony established that no solid blocks of Lower Freeport coal have been encountered at the nearby Erickson and Bonita surface mines; there is no drilling data to support a large solid block of coal on the Machipongo site; and the visual observations on the surface show extensive subsidence from collapsing old Lower Freeport deep mines on Machipongo's site. Finally, it points out that in a 1985 valuation of the Erickson property, John G. Foreman

also shared that view by concluding in that report that there was no recoverable tonnage of Lower Freeport coal on the site.

Because of that testimony, the testimony regarding surface subsidence, the presence of a mine opening, and John G. Foreman's 1985 opinion; I find John G. Foreman's opinion as to the amount of Lower Freeport coal present at the proposed Machipongo SMP not as credible as Sobek's opinion that there is only 42,000 tons of recoverable Lower Freeport coal. However, because I have accepted Foreman's recovery rate of 90% rather than the 85% used by Sobek, I will adjust Sobek's estimate by 5% to increase the amount recoverable of Lower Freeport coal to 44,100 tons.

3. The presence of Upper Freeport Coal at the Erickson site

The Commonwealth also contends that there is no recoverable Upper Freeport coal at the Erickson/Naughton site because Upper Freeport coal has been recovered at the Erickson/Hamilton site or at the western half of that pit which is the closest to the proposed Erickson/Naughton surface reserves. This argument is disconcerting because the Commonwealth is, in effect, impeaching Sobek's testimony that, in his opinion, there are 81,000 tons of Upper Freeport coal on this site; again, virtually identical to John W. Foreman's estimate of 85,000 tons once the 5% upward adjustment for the recovery rate is made. Because there is virtually no difference between the experts' opinions, I accept John W. Foreman's estimate of 85,000 recoverable tons of Upper Freeport coal at the proposed Erickson/Naughton SMP.

Appendix D

4. The Thickness of the Middle Kittanning Coal Seam

The Commonwealth contends that Sobek's calculation of the thickness of the Middle Kittanning site of 2.5 feet is more accurate than John G. Foreman's calculation of approximately 3 feet for both the Erickson/Naughton and Machipongo sites. It does so based on both observations in the field, as well as the methodology employed by the respective experts.

As to the observations, it argues that Milt McCommons measured the Middle Kittanning seam at the face wall that as 26 inches but could go as high as 30 inches. It notes that this was confirmed by Cerulla who stated that if you added the two Middle Kittanning seams together, the combined seam would be 30 inches wide. The Commonwealth also points out that its expert relied on drilling records much closer to the Machipongo site than Mr. Foreman did. Countering that, Coal Owners argues that John G. Foreman relied on data that was only 2,000 to 3,000 feet away from the Machipongo site and used coal borings only within the Goss Run UFM.

Based on the testimony of both Cerulla, the person in charge of operations at the Erickson mine and McCommons, a DER hydydrologist, that Middle Kittanning coal at the mine face of Erickson is, at most, 30 inches thick, as well as the fact that the drilling data relied on by Sobek in making his estimate is much closer to the site than that used by John G. Foreman, I find Sobek's estimate that the Middle Kittanning

seam is 30 inches thick to be more credible and will use his estimates for both mines, but with an upward adjustment to reflect a 90% recovery rate.

5. Operational Problems that Affect the Proposed Surface Mines' Economic Viability

The Commonwealth also contends that there are severe operational problems associated with the proposed Erickson/ Naughton site that make it uneconomical to mine. It argues that because none of the coal seams outcrops are within its boundaries, a boxcut which would be 140 to 190 feet deep is necessary to access the Middle Kittanning seam, the deepest seam desired to be mined. While there are outcroppings of coal on the Machipongo site, it claims that a boxcut of between 75 and 190 feet deep would be needed. The depth of this initial boxcut, it argues, would increase mining costs so as to make the mine economically undesirable.

Moreover, the Commonwealth also contends that the operational problems at both of these sites establish that neither of these sites would have economic value as independent operations. The Commonwealth argues that John G. Foreman's estimates are based on mining the Erickson/ Naughton site through the Bonita SMP to avoid boxcut problems, and mining the Machipongo site through the Cowfer side of the mine, indicated that the mining of either site alone was economically unviable under Coal Owners' theory, without including nonregulated land. While not disputing that John G. Foreman testified that the most profitable way to mine the coal was through the Bonita SMP

for Erickson/Naughton and through the Cowfer SMP for Machipongo, Coal Owners contend that he also testified they could both be economically mined as stand alone mines.

Even though it would be more economical and profitable to mine the proposed Erickson/Naughton surface mine by containing the Bonita SMP boxcuts, assuming it resumes operations, based on John G. Foreman's testimony, I find that the Erickson/Naughton proposed surface mine would be economically viable as a stand-alone mine.

D. Conclusion — Surface Mine Economic Viability.

Based on the findings made above, I find the tonnage in recoverable coal for each seam at each mine is as follows:

Seam	**Erickson/Naughton**	**Machipongo**
Upper Freeport	85,300	(none)
Lower Freeport	52,100	44,100
Upper Kittanning	90,500	98,700
Middle Kittanning	109,200	140,700
Total Coal Tons	**337,100**	**293,500**

Both Coal Owners and the Commonwealth only gave the court estimates based upon an assumption that their respective total estimate of coal tonnage would be accepted and did not address how less or more coal would affect the viability of the operation. However, for the Erickson mine, even the Commonwealth agrees that if 355,800 tons were present, then the mine would be economically viable. Because 337,100 tons is only a 5% deviation from the agreed upon

amount of coal needed to economically mine the coal, I find that the Erickson/Naughton coal mine is economically viable to mine.

However, because the proposed Machipongo SMP has only 281,500 tons of coal, approximately 25% less than Coal Owners' estimate of 355,800 recoverable coal tons, and actually closer to Sobek's estimate of 269,000 tons, I find that the Machipongo site is not economically viable.

III.

Machipongo Underground Mine

Unlike surface mining, which is totally forbidden in the Goss Run UFM, underground mining is permitted, but only if the placement of the entrances, support yards and other related above-ground structures are not located in the UFM. For the regulation to be struck down then, in addition to showing that the coal is of sufficient quantity and quality to be mineable, Machipongo must establish that the underground mine cannot be reasonably developed by accessing the property from outside the UFM — in this case, from property adjacent to the site owned by Machipongo.

Machipongo, through the testimony of John W. and John G. Foreman, proposes to double seam mine the coal by using slope entrances placed in the northwestern section of the Machipongo property between the Brisbin and the Parsonville faults within the UFM area.[12] Two slopes would be needed,

12. A slope entrance opens the mine starting at ground level and angled down — from high to low elevation — until the coal seam is reached.

one to mine each seam. Each seam would be mined in panels — i.e., room and pillar that begins in the northeastern section between the two faults southeast toward the Brisbin Dam. The pillars would be removed as the mining operation retreated from each seam. Sufficient coal is to be left to form a dam so that any underground pool left after the mining would be contained. It would be mined in two phases with the Middle Kittanning seam being mined first, then moving down to the Lower Kittanning with the coal pillars being removed as the miners retreated from mining each seam. Machipongo's proposed mine would have 13 surface openings located within the UFM designated area to allow for mine access, emergency evacuation, ventilation, electricity and removal of mine water, all within the UFM.

A. Access to Underground Coal from Outside Goss Run UFM

The Commonwealth contends that the Machipongo underground reserves can be accessed from the contiguous Machipongo property located immediately west of the UFM-designated area. In support of this position, the Commonwealth called Sobek as well as Joel Koricich (Koricich), a senior DER engineer. Both opined that a two-tiered boxcut could be placed to the west on the Machipongo-owned isolated tract outside of the UFM-designated area to access the Proposed Machipongo Deep Mine. One tier or bench of the boxcut would go down to mine the Middle Kittanning seam while the other bench would continue down to allow the underground mining of the Lower Kittanning seam. Koricich testified that the isolated site was of sufficient size to accommodate a boxcut

to expose the coal seams so the regulated Machipongo underground reserves could be accessed via a drift entry. He also testified that the mine could be constructed without support structures, such as ventilation shafts or escape tunnels inside the UFM. Citing several examples where mines were similarly developed with pits ranging in width from 100 to 300 feet and approximately 400 to 500 feet in length, in this case, he testified that the size of the cut dimensions would be within those dimensions and would be approximately four to five acres in size.

In rebuttal, Coal Owners' expert in deep mine engineering, John W. Foreman, testified that he had designed between 100-200 boxcuts in his career and actually excavated boxcuts. He testified that a boxcut placed in the isolated tract could not be used to mine the coal because:

- the area was insufficient to accommodate all of the necessary facilities, i.e., an entire coal load out facility including a raw coal belt, stacker truck loading area and stock area all within the pit. To include those items, he testified that you would need a boxcut of 19.5 acres and a bottom area of 11 acres.

- an enormous amount of overburden rock, 4,300,000 cubic yards, would have, to be moved — *twice* — in order to excavate the boxcut.

- it would be impossible to obtain all the necessary permits from the Pennsylvania Department of Transportation ("PennDOT") to construct the boxcut so close to public roads.

- the water from the mine would have to be pumped across the roads to Goss Run and it was very unlikely that one could obtain permits from PennDOT for this work, let alone actually accomplishing this task.

- the cost of excavating the boxcut would exceed $12,900,000. This figure did not include any of the other capital costs of establishing the mine. In contrast, the cost of installing a slope entry, plus all of the other capital costs of the box mine, would total approximately $1,900,000.

The Commonwealth contends that John W. Foreman's testimony that a two-tiered boxcut cannot be used to access the coal should not be accepted because his estimate of the size of the boxcut — cupped shaped with 19.5 acres wide at the top and 11 acres at the bottom — is excessively large compared to what is required. In effect, what it is arguing is that a boxcut of the size set forth in Koricich and Sobek's testimony of four to five acres should be accepted. It also disagrees with John W. Foreman's testimony as to the size of the barrier around the site. It argues that Section 86.102(g) of the regulations only requires a 100-foot barrier from the road while Foreman's testimony proposed an additional 80-foot barrier area containing a 30-40 foot wide and 15-20 foot high berm.

In evaluating whether the coal can only be mined from within the UFM, I find the testimony of John G. and John W. Foreman to be much more persuasive. John W. Foreman's testimony was very specific as to the reasons he designed a slope entrance rather than a boxcut off-site and his reasons

why a boxcut was not feasible were detailed and cogent. While he testified that an off-UFM boxcut could be utilized, Koricich never calculated the length, width or depth or how much overburden would have to be removed, and he had no idea how much such an excavation would cost in addition to never having actually designed a boxcut. While Sobek also opined that accessing the deep mine via a boxcut in the isolated tract "would be the most efficient way to access this reserve as far as a cost basis," he admitted that he did not prepare a detailed mine plan and had not prepared any calculations regarding the proposed boxcut. In the end, though, considering all the testimony, a boxcut on its face just seems impractical because of all the soil that has to be moved and replaced by the boxcut method. Because of these findings, I find that the Machipongo Deep Mine reserve can only be mined from within the UFM.

B. Economic Mineability

As mentioned, the proposed Machipongo deep mine has two seams. By acreage, those seams are 96 acres of Middle Kittanning and 96 acres of Lower Kittanning coal within the UFM. On an adjacent track located outside the UFM but within the fault seams are an additional 23 acres of Middle Kittanning coal that would also be mined. The total amount of economically mineable coal reserves for the proposed Machipongo Deep Mine rendered inaccessible by the UFM designation are: 296,000 tons of Middle Kittanning and 324,600 tons of Lower Kittanning from within the UFM area,

and 71,100 tons of Middle Kittanning and 77,700 tons of Lower Kittanning from the isolated tract (grand total of 1,287,300 tons).[13]

John W. Foreman predicted a 55% rate of recovery for the Middle Kittanning seam and a 65% rate of recovery for the Lower Kittanning seam. The higher rate predicted for the lower seam included pillars planned to be extracted during retreat from the mine itself. John W. Foreman's recovery rate calculations allowed for out-of-seam dilution, although he expected very little.

John W. Foreman testified that it would cost between $20 and $24 per ton to extract the coal. As to the amount the coal would sell for, he testified that when the regulation was promulgated in 1992, coal was selling between $24 and $30 per ton and the coal would be profitable to mine. When asked what profit margin would be needed to operate a mine, he testified that some mines may operate with a profit of as little as 10-15¢ per ton. Nonetheless, he agreed that the drop in coal prices that occurred roughly in June 1999 made the mine an "extremely marginal" proposition.

The Commonwealth contends that Foreman's economic analysis that the mine is economically viable should not be accepted because:

---

13. The Commonwealth argues that the coal from the isolated tract should not be taken into consideration because it is outside the UFM, even though owned by Machipongo. Because there is no testimony that it would not be mined as part of the underground coal reserves in the UFM, it should be included in determining whether the proposed underground mine is economically viable.

- he used an incorrect estimate of the thickness for both the Lower and Middle Kittanning Coal seam.

- Machipongo's proposed coal barrier, to be increased to prevent post mining discharge from the pool that will be created once the Middle Kittanning seam is mined out, will need to be larger than proposed, lessening the amount of recoverable coal.

- Machipongo's estimate of the cost of extracting the coal of mining is unsupported and/or contradictory and should not be accepted.

- The Middle Kittanning seam will have significant out-of-seam dilution making it cost more to mine the coal than its sale price making the mine uneconomical to develop.

1. Thickness of the Middle Kittanning Seam

As to the thickness of the coal, the Commonwealth contends that John G. Foreman's estimate of the thickness of the Lower Kittanning seam of 2.89 feet should not be accepted because it is based on only three drill holes, while there were other drill holes that were deep enough to encounter this seam but did not. If these seams were averaged in to arrive at a thickness, the coal seam would be 40% less than what Foreman estimated. The Commonwealth itself provided no witnesses estimating the thickness of this seam, but Sobek's report estimates a thickness of 2.92 feet, slightly above John G. Foreman's estimate of 2.89, which I accept.

Appendix D

As to the Middle Kittanning seam, again, the Commonwealth contends that Foreman's estimate of a three-foot thickness is incorrect. Based on the eight drill holes ranging from 5.75 to 2.08 feet in thickness, the Commonwealth contends that it should only be 2.78 feet, not the three feet testified to by John G. Foreman. Unlike for the Machipongo surface mine, Sobek did not testify concerning the thickness of the Middle Kittanning seam, but his report estimates that the Middle Kittanning seam is only 2.5 feet thick. As discussed previously, I addressed the thickness of the seam in the discussion of the surface mines and found that it was 2.5 feet thick. Here, though, the Commonwealth did not offer any testimony concerning the thickness of the Middle Kittanning seam but instead argues that its estimate of the Middle Kittanning coal seam of 2.78 feet, based on arithmetic averages from the drill holes, should be used. John G. Foreman's estimate of the Middle Kittanning seam thickness of 3 feet is not much more than the 2.78 feet the Commonwealth urges us to use instead. Because of the wide variation in coal samples thickness and the absence of any testimony regarding the thickness of the seam at these sites, I accept John G. Foreman's estimate.

2. Coal Barrier

There is no dispute that once underground mining ceases a mine pool — an underground lake containing millions of gallons of water — would form. Because the coal pillars holding the roof of the mine would be removed from the Lower Kittanning seam, subsidence would occur and all the seams that have been mined would be hydrologically connected, i.e., there would be one underground lake rather

than the three underground lakes for each seam mined.[14] To stop a break out of the water, there had to be sufficient intact coal left on the downside slope and along the side of the mine so that the water could not break out or the flow would be so minimal that it would be indistinguishable from groundwater. Such a hydrologic barrier has two components — a vertical component that needed to prevent upward migration of the water to the surface which would express itself as ground water and a horizontal component that needs to hold the pool in place.

John G. Foreman testified that because there will be a hydrologic head — water above the land surface in the downslope areas of the mine — he anticipated that there would be a vertical discharge, but because of the chemistry of the water, the water would have the same high quality characteristics that is now discharging from abandoned mines into Goss Run.[15] As to the horizontal component, he testified

14. There is already a mine pool from the previously mined Lower Freeport seam.

15. The Commonwealth also contends that the Lower Kittanning seam contains more pyrite than other coal seams being mined in the Goss Run Valley. Because pyrite, along with water and oxygen, produces acid mine drainage, the Commonwealth contends that while the mine will be inundated over a period of years which tends to lessen the production of acid mine drainage, once pyrite is exposed to air and water, subsequent inundation, i.e., the flooding of the mine, only lessens but does not stop the production of acid mine drainage. Because this water will inevitably discharge, it will harm Goss Run and will render it inhospitable for aquatic life.

This argument, though, ignores that underground mining is permitted in the UFM, only mine structures — mine openings and

(Cont'd)

that a coal barrier which on average was approximately 200 feet wide, was a sufficient barrier to contain any horizontal flows.

The Commonwealth contends that Foreman underestimated the size of the Middle Kittanning horizontal coal barrier between the mine and Brisban Dam to keep the expected mine pool from discharging into Goss Run. William R. Winters, the Commonwealth's expert hydrogeologist, testified that he considered the Middle Kittanning coal barriers inadequate because of the permeability of the coal of this seam as well as the existence of stream valley fractures or stress relief fractures in the Goss Run Valley to contain the expected mine pool. He also testified that in other places, the horizontal mine barriers up to 1,000 feet in width have failed and if one this large were required, the Commonwealth contends that such a significant amount of coal would be lost that the mine would be uneconomical to develop.

Machipongo correctly argues that this alone does not make the mine non-permittable, but while true, the size of the barrier does have an impact on the amount of coal that is available to be mined. However, nowhere in the record is there any evidence that the proposed 200-foot barrier is inadequate but only that it could be inadequate if during the mine permit process it was determined that fractures in the barrier or the coal had, for some reason, a high permeability.

(Cont'd)
ventilation shafts are prohibited. If coal was mined from off-UFM as the Commonwealth argued was possible, these environmental effects would still occur but would be dealt with through the normal permit process.

Just to say that other mine barriers have failed that are 1,000 feet in thickness does not mean that this barrier has to be 1,000 feet in thickness. Because the Commonwealth's contention that the horizontal barrier is inadequate is based on what could be discovered during the permit process, and nowhere quantifies that increase in the size of the barrier or the impact that increase would have on the economic viability of the mine, any finding that a larger barrier is needed that would make the mine non-viable would be purely speculative.

3. Cost of Extraction

The Commonwealth contends that John W. Foreman's testimony as to the cost of extracting the coal should not be accepted because it was based on unreliable, contradictory, out-of-date evidence and was too speculative to be accepted. However, Sobek, the Commonwealth's expert mining witness, substantially agreed with Foreman's estimate of the cost of extracting the coal, testifying as follows:

> Q: How does your opinion regarding the economic mineability of those underground mine tracts differ from the Foremans?
>
> A: Basically, our analysis of this area is very *similar* to what Mr. Foreman said, that the range of costs to produce this is between 20 and $24 a ton. *We are in agreement with that number. We believe that cost to be $22 to $23 per run-of-mine ton* [in 1992 dollars]. (Emphasis added.)

Transcript, p. 1044.

Appendix D

4. Selling Price and Out-of-Seam Dilution

While there is little dispute that the cost of mining is somewhere between $20 to $24, there is a dispute as to what the market would pay for the coal in 1992 or any year since that date. John W. Foreman's testimony was that coal sold for $26 to $30 per ton in 1992, which even Sobek admits on a run-of-mill basis would make the mine economical. However, the Commonwealth argues that because Middle Kittanning is a split seam, there will be significant "out-of-seam dilution" ("OSD").[16] The Commonwealth also argues that Sobek's opinion of value should be accepted, because when John W. Foreman made his estimate of the selling price of coal between $26 and $30, he did not state whether his coal was for coal of similar quality as the coal that was going to be mined from Machipongo's coal reserves on a run-of-mine basis.[17]

Sobek predicts that the coal will have an ash content in excess of 25% because of the split seam with fire clay making this a thin seam mine. Thin seam mines experience out-of-seam dilution due to mechanical methods which dictate the removal of roof material. Because of the high ash content,

16. OSD is when non-coal rock is mined along with the coal and results in additional handling of the coal (i.e., breaking or washing) and/or reduced value per ton of coal expressed as "ash" content of the coal.

17. What was surprising in this case was how little evidence was offered at trial as to the price of coal per ton in 1992 when the property was designated as a UFM. The price per ton was a raw number given by both experts with no backup.

Sobek's opinion that the highest price that coal of that type could be sold for in 1992 was between $18 and $19 per ton on a run-of mine basis, less than the $22 and $23 per ton cost needed to extract the coal, makes the coal uneconomical to mine.

Machipongo, however, argues that Sobek's calculation should not be accepted because his $18 to $19 a ton estimate was based on an ash content in excess of 25%. This ash content was based on the known ash content of the Middle Kittanning (10.14%) and the Lower Kittanning (8.52%) seams plus the OSD of over 15%. It argues that Sobek's OSD estimate is based on incomplete or faulty information or is too speculative. It points to the dilution that he calculated based upon the seam roof, for which he had no data, on the seam floor, which he said was "soft" fireclay, when fireclay is harder than coal, and on the operator whose mining practices influence the OSD when the operator has not yet been identified. Also, it contends that his OSD does not take into consideration that material from the coal would be run through a breaker that would remove some ash when sold as run-of-mine coal.

In the end, though, because fireclay is hard, not soft, other underground mines are operating in the area mining the same seams and the other factors cited by Sobek as influencing OSD, such as what the mine roof is made of and the quality of the mining operation are either too speculative or backed by insufficient information, I find that the OSD would not make the Machipongo underground mine non-viable.

Appendix D

C. Conclusion — Machipongo Underground Mine Economic Viability

The difficulty in determining the economic viability of this mine is that it is such a marginal operation. If one of the many suppositions is wrong — the thickness of the seams, the selling price of the coal, the amount of OSD — if any one of those factors is at the lower end of the range, then the mine is not economically feasible. However, no testimony was offered that the mine was not feasible because there was too much that had to go right or that it was too risky and thus "non-bankable." Based on the testimony presented and the findings I made from the testimony, I find that the Machipongo underground mine would have been economically mineable in 1992 when the UFM designation was placed on the property.

IV.

Environmental Harm

Even if all the mines were economically feasible, we allowed the Commonwealth to introduce evidence that because of the nature of the stream involved, there was no way that a mining permit would be issued for the subject property. The Commonwealth admits that it did not offer any evidence upon which a finding could be made that a permit to mine coal in Goss Run would automatically be turned down. It admits that there are no streams in which coal activities cannot take place as long as they comply with all the applicable water quality standards, including anti-degradation requirements. It argues that the test that we set

up — automatic denial of a permit — does not allow it to protect federal and state water quality standards. However, this test does no such thing.

As the Commonwealth sets out in its brief, water quality standards can be matters that are dealt with in the process to obtain a mining permit, which the property owners are required to obtain before they are permitted to mine coal. If they cannot meet DER regulations, the permit is denied; but what the UFM here does is to preclude coal owners from applying for a permit where they may have economically mineable coal. Also, the Commonwealth's argument, as we have mentioned before, ignores that underground mining, which its testimony alleged would cause most of the environmental damage because of the purported high pyrite content of Lower Kittanning coal, is still permitted within the UFM; all that is prohibited is above-ground structures within the UFM. Where we have struck down the designation, permits will have to be obtained and federal and state water quality standards met.

Appendix D

V.

CONCLUSION

As stated previously, the following fraction determines whether an unconstitutional taking has occurred:

$$\frac{\textit{the interest in the coal taken (numerator)}}{\textit{the regulated land (denominator)}}$$

"If the result of the fraction is 1, then a taking has occurred; conversely, if the fraction is anything less than 1, no compensatory taking has occurred." *Id.* at 29.

Because it has been found that the proposed Erickson/ Naughton Surface Mine and the Machipongo Underground mine are economically viable, the Coal Owners' coal interests for those mines will be used as a denominator. Because the numerator (i.e., the interest in the coal taken) is the same as the denominator, the result of the fraction is 1. Because the value of the fraction is 1, that part of the Goss Run UFM designation contained in 25 Pa. Code § 86.130(h)(14) for coal estate that designates 27 acres of the proposed Erickson/ Naughton Surface Mine and 96 acres of the proposed Machipongo Underground mine is stricken from the regulation. Because the Machipongo Surface Mine in not economically feasible, nothing was taken and the designation for that area remains in place.

Appendix D

Because Coal Owners are now free to seek permits to mine the coal, any damages that they now desire to seek shall be through the normal eminent domain process for a temporary taking.

s/ Dan Pellegrini
DAN PELLEGRINI, JUDGE

Appendix D

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NO. 248 M.D. 1992

MACHIPONGO LAND AND COAL COMPANY, INC. and the VICTOR E. ERICKSON TRUST and JOSEPH NAUGHTON,

Petitioners

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES, the ENVIRONMENTAL QUALITY BOARD and ARTHUR A. DAVIS, Secretary of ENVIRONMENTAL RESOURCES,

Respondents

ORDER

AND NOW, this 21st day of August, 2000, it is ORDERED that portion of 25 Pa. Code § 86.130(b)(14) designating lands in the Goss Run Watershed as unsuitable for mining is stricken as to the Erickson Surface Reserves and Machipongo's Underground Reserves. Unless post-trial motions are filed within ten (10) days from the date of this Order, the Prothonotary shall enter this Adjudication and Decree Nisi as the final Order and Decree.

s/ Dan Pellegrini
DAN PELLEGRINI, JUDGE

APPENDIX E — ORDER OF THE COMMONWEALTH COURT OF PENNSYLVANIA DENYING MOTION IN LIMINE DATED DECEMBER 28, 1999

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NO. 248 M.D. 1992

MACHIPONGO LAND AND COAL COMPANY, INC., et al.,

Petitioners

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES et al.,

Respondents

ORDER

AND NOW, this *28th* day of *December*, 1999, it is ORDERED that the Motion in Limine filed by the Department of Environmental resources is hereby denied.

It is further ORDERED that the issues for trial shall be limited to the minability of the property, the nature of the affected stream, and whether the stream is of a type for which the law would, *ipso facto*, prohibit mining activity to occur.

s/ Dan Pellegrini
DAN PELLEGRINI, Judge

APPENDIX F — MEMORANDUM OPINION AND ORDER OF THE COMMONWEALTH COURT OF PENNSYLVANIA DATED AND FILED OCTOBER 28, 1999

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NO. 248 M.D. 1992

Submitted: July 30, 1999

MACHIPONGO LAND AND COAL COMPANY, INC. and the VICTOR E. ERICKSON TRUST and JOSEPH NAUGHTON,

Petitioners

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES, the ENVIRONMENTAL QUALITY BOARD and ARTHUR A. DAVIS, Secretary of ENVIRONMENTAL RESOURCES,

Respondents

BEFORE: HONORABLE DAN PELLEGRINI, Judge

OPINION NOT REPORTED

Appendix F

MEMORANDUM OPINION

BY JUDGE PELLEGRINI FILED: October 28, 1999

The issue presently before this Court[1] is whether the Commonwealth of Pennsylvania, Department of

1. This case was previously before us and we transferred the matter to the Environmental Hearing Board (EHB) for disposition under the doctrine of primary jurisdiction because it had the expertise to rule on the validity of the surface mining taking claims. *See Machipongo Land and Coal Co., Inc. v. Commonwealth, Department of Environmental Resources*, 624 A.2d 742 (Pa. Cmwlth. 1993) (*Machipongo I*). Our Supreme Court, on appeal, reversed our decision and referred the case to the Court of Common Pleas of Clearfield County for further proceedings under the Eminent Domain Code, Act of June 22, 1964, Special Sess., P.L. 84, *as amended*, 26 P.S. §§ 1-101 — 1-903. *See Machipongo Land and Coal Co., Inc. v. Commonwealth, Department of Environmental Resources*, 538 Pa. 361, 648 A.2d 767 (1994) (*Machipongo II*). The Commonwealth filed an application for reargument alleging that this Court, rather than the trial court, had jurisdiction to hear this matter. The Supreme Court granted reargument and by order dated May 21, 1996, vacated its earlier decision. *See Machipongo Land and Coal Co., Inc. v. Commonwealth, Department of Environmental Resources*, 544 Pa. 271, 676 A.2d 199 (1996) (*Machipongo III*). It then remanded the case to this Court for further proceedings on the basis that the regulation upon which the Coal Owners were making their challenges was promulgated under the Commonwealth's police power rather than the Eminent Domain Code and did not fall within an enumerated exception to Section 761(a)(1) of the Judicial Code, 42 Pa. C.S. § 761(a)(1). On remand, in *Machipongo Land and Coal Company v. Department of Environmental Resources*, 719 A.2d 19 (Pa. Cmwlth. 1998) (*Machipongo IV*), in denying the Commonwealth's Motion for Summary Judgment, we set forth the standards that we were going to use to determine whether a taking had occurred.

Environmental Resources (DER), the Environmental Quality Board (EQB) and Arthur A. Davis, Secretary of the Department of Environmental Resources (collectively, the Commonwealth) is allowed to introduce evidence at trial that the proposed mining activities of Machipongo Land and Coal Company, Inc., the Victor E. Erickson Trust and Joseph Naughton (collectively, Coal Owners) will constitute a public nuisance.

Even though the designation of Goss Run as environmentally sensitive serves to deprive coal owners of all their rights to the coal estate, the Commonwealth contends that it should be allowed to introduce such evidence. It relies on our decision in *Machipongo Land and Coal Company v. Department of Environmental Resources*, 719 A.2d 19 (Pa. Cmwlth. 1998) (*Machipongo IV*), recounting the United States Supreme Court's holding in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), where we stated that whether the property owner's proposed actions constitute a public nuisance is one of the factors that must be considered in determining whether a regulatory taking will occur. The United States Supreme Court's holding was based on the principle that because a property owner has no right to commit a nuisance, regulations that deprive a property owner of a use that amounts to a nuisance do not constitute a taking. Based on that holding, the Commonwealth then goes on to argue that it should then be allowed to introduce evidence that the Coal Owners' mining on the subject property will similarly constitute a public nuisance, the public nuisance being that it could potentially harm a naturally reproducing trout stream and a recreational fishery.

Appendix F

Initially, we point out that while mining has a number of adverse effects and it is highly regulated, it has never been considered a nuisance per se in Pennsylvania. In *Berkey v. Berwind-White Coal Mining Co.*, 220 Pa. 65, 74, 69 A. 329, 332 (1908) our Supreme Court stated:

> [C]ertainly the mining and removing of coal by the party who owns it and has the right to remove it, and whose operations are conducted by the most approved methods known in mining operations, cannot be said to be a trespass, or tort, or nuisance . . . .

See also Department of Environmental Resources v. Leon E. Kocher Coal Company, 305 A.2d 78 (Pa. Cmwlth. 1973). It is only mining without a permit or contrary to Pennsylvania law or permits that would constitute a nuisance. *North Cambria Fuel Co. v. Department of Environmental Resources*, 621 A.2d 1155 (Pa. Cmwlth. 1993).

Even though mining is not a public nuisance *per se*, the Commonwealth argues that even if it deprives the Coal Owners of all rights to the coal estate, it should be allowed to establish that mining on this particular piece of land will cause a specific public nuisance, i.e. the loss of recreational fishing in a naturally reproducing trout stream.[2] In addressing

---

2. We note that unlike *Lucas*, which involved a generally applicable regulation, here we have a designation that applies only to the interests of a few property owners. In this regard, the Supreme Court stated in *Lucas*:

(Cont'd)

under what circumstances a regulation acts as a regulatory taking, the United States Supreme Court in *Lucas* stated:

(Cont'd)

> We have, however, described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical "invasion" of his property. In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation.
>
> The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land. As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation "does not substantially advance legitimate state interests or denies an owner economically viable use of his land."
>
> [T]he functional basis for permitting the government, by regulation, to affect property values without compensation — that "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," does not apply to the relatively rare situations where the government has deprived a landowner of all economically beneficial uses.
>
> . . . [A]ffirmatively supporting a compensation requirement, is the fact that regulations that leave the owner of land without economically beneficial or productive options for its use — typically, as here, by

(Cont'd)

> requiring land to be left substantially in its natural state — carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm. As Justice Brennan explained: "From the government's point of view, the benefits flowing to the public from preservation of open space through regulation may be equally great as from creating a wildlife refuge through formal condemnation or increasing electricity production through a dam project that floods private property." The many statutes on the books, both state and federal, that provide for the use of eminent domain to impose servitudes on private scenic lands preventing developmental uses, or to acquire such lands altogether, suggest the practical equivalence in this setting of negative regulation and appropriation.
>
> We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.

505 U.S. at 1015-19, 112 S.Ct. 2893-95 (citations omitted) (footnotes omitted).

In his dissent, Justice Stevens also noted that:

> In analyzing takings claims, courts have long recognized the difference between a regulation that targets one or two parcels of land and a regulation that enforces a statewide policy. As one early court stated

(Cont'd)

Appendix F

> Where "permanent physical occupation" of land is concerned, we have refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted "public interests" involved, — though we assuredly would permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's title. We believe similar treatment must be accorded confiscatory regulations, i.e., regulations that prohibit all economically beneficial use of land: Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts — by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.

505 U.S. at 1028-29, 112 S.Ct. at 2900 (citations omitted).

(Cont'd)

> with regard to a waterfront regulation, "If such restraint were in fact imposed upon the estate of one proprietor only, out of several estates on the same line of shore, the objection would be much more formidable."

505 U.S. at 1073-74, 112 S.Ct. 2924 (citations omitted).

We do not believe the Commonwealth's claim that total prohibition on use of the coal estate is justified because recreational fishing will be potentially harmed or a natural fishery will be lost is the type of nuisance envisioned by *Lucas* because it has been unable to point out that those interests, even if proven, would be a private or public nuisance at common law.[3]

At common law, Coal Owners could not have been prevented from mining the coal reserves on their property. Even though this is now a regulated activity that requires coal owners to alleviate the deleterious effects, as the Commonwealth and Coal Owners have stipulated, "[t]he right to mine the coal is a property that inheres in [Coal Owners] title subject to obtaining a permit from the Department." While polluting the waters of the Commonwealth is a public nuisance under common law, *see Commonwealth v. Barnes and Tucker Company*, 455 Pa. 392, 319 A.2d 871(1974), what now constitutes polluting the waters of the Commonwealth is governed by the Clean Streams Law.[4] To obtain a Surface

---

3. The Commonwealth argues that the General Assembly's designation of Goss Run as unfit for mining is consistent with the DER's coal owner's mining permit process, but is one that that allows others to have, in effect, a coal owner's permit denied before one is made. This argument is interesting for two reasons: first, in effect the Commonwealth is admitting that it has the ability to prevent harm through the permit process and, second, the designation has the effect of depriving the coal owners of a full blown due process hearing that they would be entitled to if their application to mine coal was denied because the designation is a legislative act not a administrative one.

4. Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §§ 691.1-691.1001.

Appendix F

Mining Permit, Coal Owners, like all surface miners, must show that they will be in compliance with the Clean Streams Law and other laws regulating mining and, if not, again like other surface miners, their surface mining permit will not be issued. Moreover, we are aware of no authority, nor has any been cited by the Commonwealth, that allows the Commonwealth, at common law, to prevent an owner from mining coal on its property because the mining activities may have the effect of causing the destruction of a natural trout hatchery or recreational fishing. It was because such concerns were outside the ambit of common law nuisance that the General Assembly enacted laws setting forth standards and authorized the promulgation of regulations to regulate mining.[5]

Accordingly, the Commonwealth will not be allowed to introduce evidence on the issue of whether Coal Owners' proposed mining activities constitute a public nuisance.

s/ Dan Pellegrini
DAN PELLEGRINI, Judge

---

5. For example, the regulations promulgated under the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. §§ 1396.2-1410d, provide that a permit will not be approved unless the applicant has demonstrated that there is no presumptive evidence of potential pollution to the waters of the Commonwealth, 25 Pa. Code § 86.37(a)(3), or the Department concludes that the activities performed under the application have been designed to prevent material damage to the hydrologic balance outside the proposed permit area, 25 Pa. Code § 86.37(a)(4).

Appendix F

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NO. 248 M.D. 1992

MACHIPONGO LAND AND COAL COMPANY, INC. and the VICTOR E. ERICKSON TRUST and JOSEPH NAUGHTON,

Petitioners

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES, the ENVIRONMENTAL QUALITY BOARD and ARTHUR A. DAVIS, Secretary of ENVIRONMENTAL RESOURCES,

Respondents

ORDER

AND NOW, this *28th* day of *October*, 1999, it is hereby ORDERED, that the Commonwealth shall not be allowed to introduce evidence on the issue of whether Coal Owners' proposed mining activities constitute a public nuisance, except to the extent that Coal Owners would be denied a permit to mine coal under the Surface Mining Act or the regulations promulgated thereunder.

s/ Dan Pellegrini
DAN PELLEGRINI, Judge

APPENDIX G — OPINION AND ORDER AND DISSENTING OPINION OF THE COMMONWEALTH COURT OF PENNSYLVANIA DATED AND FILED SEPTEMBER 30, 1998

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NO. 248 M.D. 1992
ARGUED: June 8, 1998

MACHIPONGO LAND AND COAL COMPANY, INC. and the VICTOR E. ERICKSON TRUST and JOSEPH NAUGHTON,

Petitioners

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES, the ENVIRONMENTAL QUALITY BOARD and ARTHUR A. DAVIS, Secretary of ENVIRONMENTAL RESOURCES,

Respondents

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE JAMES R. KELLEY, Judge (P.)
HONORABLE SAMUEL L. RODGERS, Senior Judge

OPINION BY JUDGE PELLEGRINI
FILED: September 30 , 1998

Appendix G

Before this Court is a motion for summary judgment filed by the Commonwealth of Pennsylvania, Department of Environmental Protection (DER), the Environmental Quality Board (EQB) and Arthur A. Davis, Secretary of the Department of Environmental Resources (collectively, the Commonwealth) in response to a petition for review filed by Machipongo Land and Coal Company, Inc., the Victor E. Erickson Trust and Joseph Naughton (collectively, Coal Owners) challenging a regulation designating portions of their land unsuitable for surface mining.

On May 26, 1989, the Commonwealth received from the Brisbin Recreation Board and the Locust Grove Sportsmen Club "A Petition To Declare Areas Unsuitable For Mining" in which they requested that the entire 2.86 square mile Goss Run Watershed (Watershed) be protected from coal mining so as to protect the quality of the water of the Goss Run stream and the Brisbin Dam and Recreational Park.[1] Coal Owners requested and were granted intervenor status because they owned surface and mineral rights in the Watershed that could potentially be affected. Specifically, Machipongo owned 2,037 acres of land in Clearfield County of which 157 acres had mineral rights in the Watershed and Erickson and Naughton owned 1,350 acres in Clearfield County of which 27 acres had mineral rights in the Watershed.

---

1. More specifically, the petition alleged that surface mining within the Watershed would adversely affect the Goss Run stream water quality and the Brisbin Dam and Recreational park; would adversely affect a recreational stocked trout fishery maintained by the Pennsylvania Game Commission; and would adversely affect wildlife habitat in the Watershed reducing its values for hunters, hikers and others who used the Watershed because of its aesthetic woodlands.

Appendix G

After public hearings were held, the DER conducted a detailed study of the proposed designated area as required by Section 4.5(g) of the Pennsylvania Surface Mining Conservation and Reclamation Act (PaSMCRA), Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. § 1396.4e(g). Essentially, the results of the study indicated that surface coal mining of the Watershed upstream of the Brisbin Dam had significant potential to disrupt the hydrologic balance causing decreases in the net alkalinity of discharges from abandoned Lower Freeport underground mines and destroying the habitat for wild trout populations. It also had a high potential to cause increases in dissolved solids and metals concentrations in Goss Run that would adversely affect the use of the stream as an auxiliary water supply. The DER recommended that the EQB approve a proposed regulation designating the surface mineable coals located within the Watershed upstream of the Brisbin Dam as unsuitable for surface mining of coal and submitted that recommendation to the General Assembly. The EQB approved the proposed regulation, and after a period of public comment, the General Assembly also approved the notice of proposed rulemaking and adopted a final regulation designating a portion of the Watershed unsuitable for mining (UFM) as set forth at 25 Pa.Code § 86.130(h)(14).[2]

---

2. That section provides:

> The surface mineable coal reserves within the Goss Run watershed upstream of the Brisbin Dam, including a small tract of land within the watershed of the West Tributary to Goss Run, a total of approximately 555 acres, are designated unsuitable for all types of surface mining operations.

The regulation was published as final in the Pennsylvania Bulletin on May 3, 1992. *See* 22 Pa. B. 2715.

That designation was made pursuant to Section 4.5(b) of the PaSMCRA, 52 P.S. § 1396-4e(b), that permits the Commonwealth to designate an area as unsuitable for surface mining.

Subsequently, on July 1, 1992, Coal Owners filed a petition for review against the Commonwealth in our original jurisdiction seeking equitable and declaratory relief challenging the regulation designating that certain portions of land they owned in the Watershed were unsuitable for surface mining. They alleged that 157 acres of the 2,037 acres of land owned by Machipongo in the south reserves of the Watershed had mineral rights that were within the UFM designated area and could not be mined, resulting in a taking of at least 1,344,800 tons of its coal valued at $2,846,550. Similarly, 27 acres of the 1,350 acres owned by Erickson and Naughton in the north reserves of the Watershed could not be mined, resulting in a taking of at least 377,900 tons of their coal valued at $566,850. Based on Coal Owners' inability to mine any of their coal located within the UFM designated area, they alleged that the regulation implementing the designation constituted a taking without just compensation and a violation of their due process rights. They requested, among other things, that this Court enjoin the enforcement of the regulation as an unconstitutional taking of their property or remand the case to the trial court to determine the value of the property taken as a result of the adoption of the regulation.[3]

---

3. Coal Owners also requested that we order the Commonwealth to adopt regulations containing constitutional safeguards for affected landowners and to declare the regulation void; or order the Commonwealth to hold a hearing with constitutional guarantees to determine whether the regulation should be adopted.

Appendix G

After much litigation as to the proper forum to hear this case, our Supreme Court remanded it to us for resolution.[4] The Commonwealth has now filed a motion for summary

---

4. In response to Coal Owners' petition, the Commonwealth filed preliminary objections alleging, *inter alia*, that this Court lacked jurisdiction to hear the case. Agreeing with the Commonwealth that we lacked jurisdiction, we granted the preliminary objections and transferred the matter to the Environmental Hearing Board (EHB) for disposition because it had the expertise to rule on the validity of the surface mining taking claims. *See Machipongo Land and Coal Co., Inc. v. Commonwealth, Department of Environmental Resources*, 624 A.2d 742 (Pa. Cmwlth. 1993) (*Machipongo I*). We transfered the case to the EQB under the doctrine of primary jurisdiction that allows courts to allocate business between themselves and agencies responsible for regulation of certain industries.

Both the Commonwealth and Coal Owners filed appeals with the Supreme Court arguing that the transfer of the case to the EHB was erroneous. Coal Owners argued that their taking claims should be addressed by the courts while the Commonwealth argued they should be addressed by the DER. By order dated October 11, 1994, the Supreme Court reversed our decision and referred the case to the Court of Common Pleas of Clearfield County for further proceedings under the Eminent Domain Code, Act of June 22, 1964, Special Sess., P.L. 84, *as amended*, 26 P.S. § § 1-101 — 1-903. *See Machipongo Land and Coal Co., Inc. v. Commonwealth, Department of Environmental Resources*, 538 Pa. 361, 648 A.2d 767 (1994) (*Machipongo II*). The Commonwealth filed an application for reargument alleging that this Court, rather than the trial court, had jurisdiction to hear this matter. The Supreme Court granted reargument and by order dated May 21, 1996, vacated its earlier decision. *See Machipongo Land and Coal Co., Inc. v. Commonwealth, Department of Environmental Resources*, 544 Pa. 271, 676 A.2d 199 (1996) (*Machipongo III*). It then remanded the case to this Court for

(Cont'd)

judgment that is presently before this Court.[5] It contends that the regulation is not a taking because the UFM designation was adopted for a public purpose, provides protection to the Watershed and is not unduly oppressive. It also argues that the designation does not deprive Coal Owners of all beneficial use of their land because the designated area only comprises 8% of the total land owned by Machipongo and 2% of the land owned by Erickson and Naughton in Clearfield County. Because it avers that the majority of Coal Owners' land is adjacent to the designated area, the Commonwealth contends they have not lost all economical use of their land. It further argues that even if we only consider the designated land for purposes of a taking, because Coal Owners still have use of their surface rights for that land and because it can be used for purposes other than mining such as for the sale of lumber, it still has value and Coal Owners have not been denied all beneficial use of their land.

Not denying at this time that the regulation allowing for the UFM designation is valid, Coal Owners argue that a taking

---

(Cont'd)

further proceedings on the basis that the regulation upon which the Coal Owners were making their challenges was promulgated under the Commonwealth's police power rather than the Eminent Domain Code and did not fall within an enumerated exception to Section 761(a)(1) of the Judicial Code, 42 Pa.C.S. § 761(a)(1).

5. Summary judgment is appropriate when there is no genuine issue of material fact and the movant clearly establishes its entitlement to judgment as a matter of law. *Mason & Dixon Lines, Inc. v. Mognet*, 645 A.2d 1370 (Pa. Cmwlth. 1994). When considering a motion for summary judgment, the court must examine the record in the light most favorable to the non-moving party, accepting as true all well-pleaded facts and all inferences to be drawn therefrom. *Id.*

has occurred because they have been deprived of their right to surface mine their coal in the designated area and, therefore, have been denied all economical use of that land. They contend this is so because Pennsylvania recognizes coal as a separate estate in land and whether they can still utilize the surface rights of their land in the designated area is irrelevant.

I.

Both the Fifth Amendment to the United States Constitution and Article 1, Section 10 of the Pennsylvania Constitution expressly provide that private property may not be taken under the powers of eminent domain for public use without payment of just compensation.[6] A taking occurs when the entity clothed with the power of eminent domain substantially deprives an owner of the use and enjoyment of his property. *Machipongo III.* A taking may also occur if a regulation enacted for a public purpose under the government's police powers prevents the landowner from using his land.[7] In *Machipongo III*, our Supreme Court held that Section 4.5(b) of the PaSMCRA, which allowed the

6. The Fifth Amendment to the United States Constitution states: "nor shall private property be taken for public use, without just compensation." Article 1, Section 10 of the Pennsylvania Constitution provides: "nor shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured."

7. The government's police power arises from the Fourteenth Amendment to the United States Constitution and Article 1, Section 1 of the Pennsylvania Constitution.

Commonwealth to designate the Watershed as unfit for mining, was an act deemed to be an exercise of its police power.

The test for determining whether a regulation amounts to a taking and requires the payment of just compensation has evolved over the years. The test, which was first established in *Lawton v. Steele*, 152 U.S. 133 (1894), has come to be known as the "traditional" takings analysis. In *Lawton*, the United States Supreme Court set forth the following factors to be considered when determining whether a regulatory taking had occurred:[8] 1) whether the public interest required such interference; 2) whether the means chosen were reasonably necessary for the accomplishment of the purpose; and 3) whether the means chosen were not unduly oppressive on individuals. In deciding whether the public interest required protection, the Court noted that it had to be determined whether the use of the property violating the regulation constituted a public nuisance and, if so, whether the property was subject to abatement. This traditional test involved a balancing of interests by the courts and required a case-specific inquiry into the public interest advanced by the regulation. If the public interest advanced was greater than the rights lost by the individual, the regulation was not a taking and compensation was not owed.[9]

---

8. *Lawton* involved a regulation in New York that protected certain species of fish by prohibiting fishing in specific areas. Plaintiffs challenged the constitutionality of the regulation after their $15 fishing rods were taken and destroyed because they were used in violation of the regulation.

9. *See also Miller & Son Paving, Inc. v. Plumstead Township*, __ Pa. __, __ A.2d __ (filed August 19, 1998), where our Supreme (Cont'd)

Appendix G

The Supreme Court continued to utilize the traditional test in *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922), one of the first cases dealing with coal estates and regulatory takings. In that case, a residence deeded to Mahon stood on property that had coal below that was owned by a coal company. While the deed of the property conveyed the surface rights to Mahon, it expressly reserved the right by the coal company to remove all the coal under that property with Mahon assuming the premises with the risks and waiving all claims for damages as a result of the mining. Subsequently, the Kohler Act was enacted and prevented the coal company from removing the coal if it would cause subsidence of any structure used as a human habitat. After the coal company brought an action and the state Supreme Court found that the regulation was constitutional, but the coal company had contract and properly rights also protected by the Constitution, Mahon appealed.

The Court performed a balancing test stating that the extent of the public interest shown by the regulation was limited because it ordinarily did not apply to land when the surface was owned by the owner of the coal. It also determined that the source of damage to the house was not a public nuisance even if similar damage was inflicted on others

---

(Cont'd)
Court recently utilized the test set forth in *Lawton* with the following minor modifications: 1) the interest of the general public, rather than a particular class of persons, must require governmental action; 2) the means must be necessary to effectuate that purpose; and 3) the means must not be unduly oppressive upon the property holder, considering the economic impact of the regulation, and the extent to which the government physically intrudes upon the property.

in different places because it was neither common nor public. Stating that "[f]or practical purposes, the right to coal consists in the right to mine it," *Id.*, 260 U.S. at 414, the Court determined that if anyone was so shortsighted as to only acquire surface rights without the right of support, the owner of the coal rights would have to be compensated because all of its coal would be taken. The Court ultimately held that the regulation was a taking and concluded, "[t]o make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it." *Id.*

Many years later, in *Penn Central Transportation Company v. New York City*, 438 U.S. 104 (1978), *reh'd denied*, 439 U.S. 883 (1978), the Supreme Court again had the opportunity to apply the balancing test when addressing New York City's Landmarks Preservation Law as it applied to Grand Central Terminal. Penn Central, which owned the Terminal, wanted to construct an additional 50 stories on top of the Terminal but was denied the appropriate permits due to the preservation regulation. It appealed arguing that the regulation had taken its property for public use without just compensation in violation of the Fifth Amendment because it had taken its right to air space. Utilizing the balancing test, the Court held that the regulation did not amount to a taking because the preservation of historical buildings was related to the promotion of the general welfare and the Terminal was still economically viable — i.e., it could still be used for its intended purpose without any loss of profit from its continued use. It also noted that the regulation did not interfere with Penn Central's investment-backed

expectations because development rights that had been denied to Penn Central for the Terminal had been made transferable to numerous other sites in the vicinity of the Terminal.[10]

What was notable about the *Penn Central* case was that it expanded the third prong of the balancing test to include a determination of whether there was some economic value left to the landowner's property, not just a determination of whether the landowner was "unduly oppressed." The test in that form was utilized by the Supreme Court in *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470 (1987), when it again had the opportunity to address whether a regulation dealing with coal rights constituted a taking. *Keystone* involved Pennsylvania's Bituminous Mine Subsidence and Land Conservation Act, 52 Pa.C.S. § 1406.6, an Act that strictly regulated coal mining in areas that were subject to subsidence and required that 50% of the coal under structures be left in place to prevent subsidence from occurring. The Coal Association argued that it was being denied the right to mine 27 million tons of coal, and that the Court should rely on its holding in *Mahon* to find that the Act constituted a taking for which it was entitled to compensation. Relying on the test enunciated in *Penn Central*, the Court stated:

> Because our test for regulatory taking requires us to compare the value that has been taken from the

---

10. The Court did not reach the issue of whether there had been a taking of the air space because even though the permits had been denied for the construction of an additional 50 stories, the Commission had not indicated that approval would be denied for a smaller structure that had not yet been sought.

> property with the value that remains in the property, one of the critical questions in determining how to define the unit of property "whose value is to furnish the *denominator* of the fraction." (Emphasis added.)

Id., 480 U.S. at 497.

Although the Court apparently looked at the contiguous land owned by the Coal Association as well as the regulated land, it did not explain why the total land owned was used as the denominator of the fraction. It then concluded that there was no regulatory taking because the Coal Association had not lost *all* viable economical value use of its land as it had never claimed their mining operations had been unprofitable since the Act was passed or that mining in any specific location affected by the 50% rule had been unprofitable. Additionally, it still possessed mineral rights in the regulated area that could be mined profitably and there had been no undue interference with its investment-backed expectations. Finally, the Court held that the Act required coal to be left in place for legitimate public safety reasons.

After *Keystone*, the traditional test had evolved to require a determination of whether the landowner had any economically viable use of his land remaining.[11] If the land

---

11. One year after *Keystone* was decided, this Court in *McClimans v. Board of Supervisors of Shenango Township*, 529 A.2d 562 (Pa. Cmwlth. 1987), had the opportunity to utilize the test set forth in *Keystone* to decide whether the inability to mine coal constituted a regulatory taking. In that case, McClimans leased to

(Cont'd)

was totally valueless, then a *per se* taking had occurred. However, if some value remained and the landowner's investment-backed expectations had not been interfered with, a balancing test was still required to determine whether the public's interest was greater than the landowners' diminution of land.[12]

(Cont'd)

Amerikohl the right to remove coal on their property. Subsequently, the Township enacted an ordinance that stated surface mining was not a permitted use in the R-1 zone in which the property was located. McClimans argued that if the coal on its land could not be mined, the ordinance constituted a taking. On appeal, we relied on *Keystone* and held that if the McClimans' coal could not be mined, the ordinance would constitute a taking. However, because it had not yet been determined whether there were alternative means to reach the coal other than through surface mining, the case was remanded for that determination.

Relying on footnote 4 in *McClimans*, the dissent contends that it stands for the proposition that the three separate estates in land are without significance in a taking analysis. However, footnote 4 of that opinion states:

> While the significance of the distinction between the coal estate and the surface estate remains viable for land use regulation purposes the **significance of the support estate seems to have been obliterated**, at least for purposes of deciding taking issues under the *federal* constitution . . . (Italics in the original; bold added.)

This statement is merely a comment on what the United States Supreme Court stated in *Keystone. See* footnote 26.

12. The fraction for determining whether a taking has occurred has been expressed as follows:

(Cont'd)

Appendix G

The last and most recent case decided by the Supreme Court in the area of regulatory takings is *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). In *Lucas*, the Court was faced with deciding whether a regulation that took 100% of the value of landowner's property constituted a taking. Landowner paid $975,000 for two residential lots in South Carolina on which he planned to build single-family homes. After the purchase of the property, the Beachfront Management Act was enacted to prevent erosion and had the effect of preventing Lucas from building any structures on his properties and rendering those properties worthless. Lucas filed suit arguing that even though the Act was valid because it was a lawful exercise of police power, it resulted in a taking of his property without just compensation because his properties were valueless.

Not discussing the investment-backed expectation factor but recognizing that there was a *per se* taking if the owner of the property was required to sacrifice all economical

---

(Cont'd)

> [A] court must compare the loss of property use resulting from a regulation, x, to the sum of all usage rights inherent in a piece of property, y. If x/y equals 1, then a taking has occurred; if x/y is something less than 1, the property owner is entitled to nothing. If the relevant property interest, y, is defined narrowly enough, as, for example, only those rights that have been regulated away, then a taking will always have occurred . . . On the other hand, if the relevant property interest is defined broadly enough, a regulatory taking will never occur.

Comment, *Unearthing the Denominator in Regulatory Takings Claims*, 61 U. Chi. L. Rev. 1535, 1536 (1994).

beneficial use of his land,[13] the Court went on to hold that if the regulation prohibited the use under nuisance law, there would be no taking even if it had the effect of totally depriving the landowner of all beneficial use. Just as it had originally analyzed regulatory takings in *Lawton*, the Court in *Lucas* also found that if the use constituted a nuisance, the public's interest prevailed regardless of what the landowner had lost.

After *Lucas*, then, the test to determine whether there is a regulatory taking is based on the following factors:

- whether the public interest requires regulatory interference with the property right;
- whether the regulation is reasonably related to that goal;
- whether the amount of property taken deprives an owner of *all* economical viable uses of the property, measured by what was taken (the numerator) against what was left (the denominator); and

---

13. "The principle that underlies this doctrine is that while most burdens consequent upon government action undertaken in the public interest must be borne by individual landowners as concomitants of the advantage of living and doing business in a civilized community, some are so substantial and unforeseeable and can so easily be identified and redistributed, that justice and fairness require that they be borne by the public as a whole." *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1 (1984).

- whether property owner's actions or proposed actions would cause a nuisance.[14]

II.

In this case, Coal Owners aver that just as in *Lucas*, they, too, have lost all viable economical use of their land because coal is a separate estate in land and they have no access to mine any of their coal in the designated area. The Commonwealth, however, argues that the coal estate is part of the entire parcel of land owned by Coal Owners, including the surface rights and the property owned adjacent to the designated area, and that entire parcel is the proper "denominator" to be used to decide if all economical use is gone.

The difficulty in determining the land to be used as the denominator in deciding if there is a deprivation of all economical beneficial use of land was recognized by the Court in *Lucas:*

> Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured. When, for example, a regulation requires a developer to

14. *But see* Kanner, *Hunting the Snark, Not the Quark: Has the U.S. Supreme Court Been Competent in Its Effort to Formulate Coherent Regulatory Takings Law?*, The Urban Lawyer, Vol. 30, No. 2, 307 (1998) (Supreme Court decisions in regulatory takings law are incoherent and cannot be rationalized).

> leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole.

Id., 505 U.S. at 1016.

In attempting to resolve this difficulty, the Courts have addressed the problem of deciding how the denominator is determined in a regulatory takings case, but they have never agreed on the appropriate method for determining that portion of the fraction and have provided little in the way of guidance. Essentially, though, they have all utilized one of the following three approaches: 1) the contiguous land under a common owner approach; 2) the property interest as defined by the regulation; and 3) the multi-factor analysis.

The Commonwealth urges us to adopt the "contiguous land under a common owner approach," a bright line test that looks at all of the property the landowner owns, including both the regulated land and any contiguous land that is not regulated — in this case, surface rights. The denominator of the fraction becomes the total property owned by the landowner. The only calculation then that has to be done is to compare the percentage of land regulated (the numerator) by the total land owned (the denominator).[15]

---

15. *See Jentgen v. United States*, 657 F.2d 1210 (Ct. Cl. 1981).

While this is an easy approach to take, there are impediments to its use. First, there is a facial unfairness in this approach. For example, consider the following: there are two contiguous properties, parcel A consisting of 10 acres and adjacent parcel B consisting of 100 acres, both owned by different individuals. The Commonwealth enacts legislation barring development of a 20-acre area for a valid state purpose but depriving landowner(s) of any economically beneficial use. The 20 acres that are protected by statute turn out to encompass all 10 acres of parcel A and only 10 acres of Parcel B's 100 acres. Under this approach, the landowner of parcel A would be compensated for a total taking of parcel A while the landowner of parcel B would not be compensated at all because his percentage of total acreage owned far outweighs the regulated land, resulting in a *de minimis* taking of only one-tenth of his property.

Another problem this approach presents is how to treat contiguous property previously owned by the landowner that was either developed or "sold off." This problem was illustrated in *Deltona Corporation v. United States*, 657 F.2d 1184 (Ct. Cl. 1981), where Deltona purchased a 10,000 acre parcel on the Florida Gulf coast with the intention of developing 12,000 single-family homes. It divided the land into five parcels, obtained the requisite permits, and sold the individual tracts in one area. However, the Army Corps of Engineers subsequently denied requests to develop two other parcels in order to preserve wetlands. Arguing on appeal that because they could not develop the property there had been a taking of that property, the Court of Federal Claims determined that the relevant parcel for determining the denominator was the entire 10,000 acre tract originally

purchased by Deltona, even though it had previously sold a portion of that land. Using land once owned by the landowner to arrive at a denominator ignores that the property no longer belongs to the landowner to do with as he pleases.

The second approach, which the Coal Owners urge us to adopt — defining the property interest by the regulation — is also a bright line test that only uses the regulated land as the denominator. Just as with the first approach, the benefit of this test is that it is one easily applied by the courts because they need only determine the actual land within the regulated area. This approach, however, has the downside that almost any regulation can result in a take, e.g., a set-back requirement in a zoning ordinance could result in a take because it does not balance the public's interest with private property rights.

The third approach — the multi-faceted approach — considers various factors in determining the denominator. They include whether the landowner had investment backed expectations;[16] whether any land that could be part of the denominator was sold or developed prior to the regulation's enactment or enforcement;[17] the dates of acquisition;[18] the extent to which the parcel has been treated as a single unit;[19]

---

16. *See Florida Rock Industries. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994).

17. *See Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994).

18. *See American Savings & Loan Association v. Marin County*, 653 F.2d 364 (9th Cir. 1981).

19. *See Ciampitti v. United States*, 22 Cl. Ct. 310 (1991).

and the extent to which the protected land enhances the value of the remaining land.[20] Just like any test that balances various considerations on an ad hoc basis, the multi-faceted approach fails to offer either regulators or property owners any certainty as to whether a regulation will result in a taking. It also has some of the same disadvantages as the contiguous land approach in that the outcome is determined by the status of those who own the land and their "expectations."

Of these three approaches, we believe the property interest by regulation approach is the best one to determine the denominator, but with some important modifications to take into consideration the need for governmental regulation in the public interest. Although this approach tilts in the landowner's favor, "historically the Takings Clause was designed to protect private citizens from governmental interference with property rights. Therefore, it makes sense for courts, at least initially, to tip the scales slightly in the plaintiff's favor."[21] However, while the regulated land would first be considered under this approach, to determine whether it actually would be the denominator would depend on the answers the courts received to the following questions:[22]

- whether the regulated land had value prior to the regulation;

---

20. *Id.*

21. Lisker, *Regulatory Takings and the Denominator Problem*, 27 Rutgers L.J. 663, 720 (1996).

22. This approach is suggested in Comment, *Unearthing the Denominator in Regulatory Takings Claims*, *supra*.

- whether the regulated land has a separate use from the non-regulated contiguous parcel(s) — i.e., whether it may be profitably used if it is the only parcel; and

- if the regulated land has value separate from the contiguous land, whether all of its economic benefit is gone.

If the regulated land had no value prior to the regulation because it had no viable use, it could not serve as the denominator and there would be no taking because the regulation would not have deprived the landowner of its use. However, if the regulated land had an economically viable use separate and apart from any other contiguous land that was owned and became valueless after the regulation, it would become the denominator in the fraction and there would be a taking. Under our test, if the Commonwealth could show that Coal Owners had other access to mine their coal, then the land would not be valueless and there would be no taking. This approach is best because it fosters predictability, focuses on the effect of the governmental regulation on the property and not on the circumstances of the property owner, and results in fairness because it treats all property owners the same.

III.

Because we have determined that only the regulated land is to be considered in determining the denominator, we must next determine how to treat Coal Owners' coal estate in the UFM designated area. The Commonwealth suggests we

should calculate the denominator based on finding Coal Owners' rights in the coal estate are just part of the bundle of rights they own in land. If we were to do so, there would be no taking because Coal Owners do not dispute that they still have surface rights that can be used and they would not be deprived of all economical beneficial use of their land. If, however, we were to agree with Coal Owners that it did not matter what other estates in land they owned because the coal estate was treated as a separate estate, then there would be a taking because they would be deprived of their right to mine that land.

In most other states, coal estates are not treated as separate estates from surface estates. However, Pennsylvania is unique from other states in that it has long recognized three separate estates in land — surface, coal/mineral and the right to support. *Commonwealth v. Fitzmartin*, 376 Pa. 390, 102 A.2d 893 (1954); *Stabler Development Company v. Board of Supervisors of Lower Mt. Bethel Township*, 695 A.2d 882 (Pa. Cmwlth. 1997); *Millcreek Township v. N.E.A. Cross Company*, 620 A.2d 558, n.8 (Pa. Cmwlth. 1993); *Gardner v. Commonwealth of Pennsylvania, Department of Environmental Resources*, 603 A.2d 279 (Pa. Cmwlth. 1992). All three estates may be owned separately, *Fitzmartin*, and taxed separately,[23] although the right to support is generally owned by either the owner of the surface or coal estate.[24]

---

23. *See Bannard v. New York State Natural Gas Corporation*, 448 Pa. 239, 293 A.2d 41 (1972) (mineral estate became subject to separate taxation when it was severed from surface estate).

24. In *Keystone*, the United States Supreme Court, commenting about how Pennsylvania law treated the support estate and tied it to either the surface or mineral rights, stated:

(Cont'd)

Appendix G

Owners of coal estates that do not own the surface rights have the right to remove the coal by using portions of the surface as reasonably necessary to remove the coal. *Greek v. Wylie*, 266 Pa. 18, 109 A. 529 (1920); *Baker v. Pittsburg, C. & W. R. Co.*, 219 Pa. 398, 68 A. 1014 (1908). Because separate estates create separate interests, the appropriate denominator by which to determine whether Coal Owners have lost all viable economic use of their land is solely the coal estate in the UFM designated area.

(Cont'd)

The Court of Appeals, which is more familiar with Pennsylvania law than we are, concluded that as a practical matter the support estate is always owned by either the owner of the surface or the owner of the minerals. It stated:

> "The support estate consists of the right to remove the strata of coal and earth that undergird the surface or to leave those layers intact to support the surface and prevent subsidence. These two uses cannot co-exist and, depending upon the purposes of the owner of the support estate, one use or the other must be chosen. If the owner is a mine operator, the support estate is used to exploit the mineral estate. When the right of support is held by the surface owner, its use is to support that surface and prevent subsidence. Thus, although Pennsylvania law does recognize the support estate as a 'separate' property interest, it cannot be used profitably by one who does not also possess either the mineral estate or the surface estate."

Id., 480 U.S. at 501, 107 S.Ct. at 1250.

We need not address here whether the Supreme Court's interpretation of Pennsylvania law in this area is accurate.

IV.

In this case, using the regulated land standard to determine whether there is a taking would result in the following fraction:

$$\frac{\textit{the interest in coal taken (numerator)}}{\textit{the regulated land (denominator)}}$$

If the result of the fraction is 1, then a taking has occurred; conversely, if the fraction is anything less than 1, no compensatory taking has occurred and we would grant the Commonwealth's motion for summary judgment.[25]

However, because there are several facts that are not before us, we are unable to calculate the value of the fraction. To make that calculation, it must be determined if the coal estate had value prior to the UFM designation, whether it had a separate use from the non-regulated contiguous land Coal Owners owned, and whether all of its economic benefit was gone as a result of the regulation. If, after that determination is made, the result of the fraction is less than 1, then a taking has not occurred. In this case, specific evidence would have to be adduced as to whether the coal can be extracted by subsurface mining; whether the land in

25. Most courts have required that the fraction be reduced to 1 in order for there to be a taking and compensation paid. *See, e.g. Lucas, supra*; *Deltona, supra.* However, the Federal Circuit Court appears to allow the payment of compensation for a taking when the result is somewhat less than 1. *See Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994); *Florida Rock Industries v. United States*, 18 F.3d 1560 (Fed. Cir. 1994).

the regulated area cannot be surface mined without using the contiguous parcel; and whether the grade of coal is insufficient in amount or quality to economically mine. With that evidence, the denominator can be fixed and we can then determine whether the regulation has resulted in an unconstitutional taking and either enjoin the regulation or find that the Commonwealth's UFM designation is a permissible regulatory restriction on the use of the land.[26]

---

26. The Commonwealth also contends that if we find the regulation restricts Coal Owners' ability to mine their coal, we should only find that there has been a temporary taking because regulatory takings are temporary in nature and only exist until invalidated by a court. In response, Coal Owners argue that they are not seeking to invalidate the regulation and only seek compensation for a total taking of their coal estate. Not only is Coal Owners' argument at variance with the relief sought in their petition for review, but it is beyond this Court's jurisdiction if we find the regulation null and void as a taking. Our jurisdiction only extends to the validity of the regulation. Once the regulation is declared invalid, the nature of the take and compensation due must be determined in a petition for the appointment of a board of viewers before the appropriate court of common pleas. *See Gold v. Summit Township*, 660 A.2d 215 (Pa. Cmwlth. 1995), *petition for allowance of appeal granted*, 544 Pa. 616, 674 A.2d 1077 (1996) and *appeal dismissed*, 548 Pa. 60, 694 A.2d 342 (1997).

We note, however, without deciding this issue, that our Supreme Court in *Miller & Son Paving, Inc. v. Plumstead Township*, *supra*, recently addressed whether property was temporarily taken when landowners were prevented from using their land for a limited time until a zoning ordinance was amended. There, Miller owned property in an R1 residential district that he wanted to use for quarrying, a use not permitted in that zone. The Court held there was no temporary taking of the land because it still had other viable uses as a residential property.

Appendix G

Because genuine issues of material facts still remain as to whether the Commonwealth's designation of Coal Owners' property as unsuitable for mining resulted in a taking, the motion for summary judgment filed by the Commonwealth is denied.

s/ Dan Pellegrini
DAN PELLEGRINI, JUDGE

Appendix G

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NO. 248 M.D. 1992

MACHIPONGO LAND AND COAL COMPANY, INC. and the VICTOR E. ERICKSON TRUST and JOSEPH NAUGHTON,

Petitioners

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES, the ENVIRONMENTAL QUALITY BOARD and ARTHUR A. DAVIS, Secretary of ENVIRONMENTAL RESOURCES,

Respondents

ORDER

AND NOW, this 30th day of September, 1998, the motion for summary judgment filed by the Commonwealth of Pennsylvania, Department of Environmental Protect, the Environmental Quality Board and Arthur A. Davis, Secretary of the Department of Environmental Resources, in response to the petition for review filed by Machipongo Land and Coal Company, Inc., the Victor E. Erickson Trust and Joseph Naughton, is denied.

s/ Dan Pellegrini
DAN PELLEGRINI, JUDGE

Appendix G

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 248 M.D. 1992
ARGUED: June 8, 1998

MACHIPONGO LAND AND COAL COMPANY, INC. and the VICTOR E. ERICKSON TRUST and JOSEPH NAUGHTON,

Petitioners

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES, the ENVIRONMENTAL QUALITY BOARD and ARTHUR A. DAVIS, Secretary of ENVIRONMENTAL RESOURCES,

Respondents

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE JAMES R. KELLEY, Judge (P.)
HONORABLE SAMUEL L. RODGERS, Senior Judge

DISSENTING OPINION
BY SENIOR JUDGE RODGERS

FILED: September 30, 1998

Appendix G

I respectfully dissent.

The only issue before this Court is whether the Commonwealth is entitled to summary judgment because the petitioners, Machipongo and Erickson-Naughton, have failed to produce evidence that the Commonwealth has deprived them of all beneficial use of their land by means that are unduly oppressive.

The petitioners claim that a regulation of the Environmental Quality Board which designated a small portion of their property as unsuitable for surface coal mining entitles them to millions of dollars in compensation based on a royalty on every ton of coal allegedly taken by the regulation.

The thrust of the petitioners' argument, accepted by the majority, is that the only use of an estate in coal is the right to mine it, and that any regulation, regardless of its merit, that takes away such right to the slightest extent, requires full monetary compensation, because they have been deprived of all beneficial use of their property, citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

Until 1987, the only available remedy for a regulation that went 'too far' was invalidation of the regulation. *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987). Recently, in *Miller & Son Paving Inc. v. Plumstead Township*, __ Pa. __, __ A.2d __ (1919 E.D. Appeal Docket 1997, filed August 19, 1998), the Supreme Court of Pennsylvania held that even though a township zoning ordinance prohibiting the mining of rock was invalid, the property owner was not entitled to money damages for a

temporary taking, because other uses clearly existed, and that a holding to the contrary could have a chilling effect on land use planning.

Our Court has acknowledged that for the purpose of deciding taking issues under the federal constitution, the vertical division recognized in Pennsylvania law that coal, surface, and the right to support are three separate estates is without significance. *McClimans v. Board of Supervisors of Shenango Township*, 529 A.2d 562, 569 n. 4 (Pa. Cmwlth. 1987) (*McClimans I*). It is undisputed that the petitioners in this case have other uses for their properties, including the sale of oil and gas rights, the sale of timber, and the sale of land for residential and other uses. The petitioners have therefore failed to adduce any evidence of a taking under federal law. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978); *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987). The petitioners' reliance on *Lucas*, *supra*, is misplaced, because in that case the court found that the property owners had been deprived of all beneficial uses of their beachfront lots.

The petitioners also claim a taking under state law. This claim is based on the notion that the Commonwealth must pay for every ounce of coal they are unable to mine, regardless of the merit of the regulation. But in the petitioners' brief, p. 10, they say:

> Prior to the designation of the UFM area, all of the mineable and marketable coal situated in the applicable area was considered permittable,

> **excluding the usual barrier areas required for streams, dams, dwellings, highways, etc.** (Emphasis supplied.)

The question therefore arises why the Commonwealth cannot designate a "barrier" area to preserve the quality and quantity of the water in this watershed.

The petitioners rely upon *McClimans I*, *supra*, and *Board of Supervisors of Shenango Twp. v. McClimans*, 597 A.2d 738 (Pa. Cmwlth. 1991) (*McClimans II*), to prove a taking under state law. In *McClimans I*, our Court said that a zoning ordinance's exclusion of mining on the surface is a compensable taking of the coal estate below if the ordinance conclusively prevents an owner from gaining access to his subsurface property.

However, in *Miller*, *supra*, our Pennsylvania Supreme Court characterized this statement as dicta, and held that in order to be a compensable taking, the ordinance must be unduly oppressive and deprive the owner of all beneficial use of its property, which is basically the holding in *Lucas*.

In *Keystone*, where the parties had stipulated that enforcement of the Pennsylvania law would require the petitioners to leave approximately 27 million tons of coal in place, in upholding the law, the United States Supreme Court said:

> When the coal that must remain beneath the ground is viewed in the context of any reasonable unit of petitioners' coal mining operations and

> financially backed expectations, it is plain that the petitioners have not come close to satisfying their burden of proving that they have been denied the economically viable use of that property. The record indicates that only about 75% of petitioners' underground coal can be profitably mined in any event, and there is no showing that petitioners' reasonable 'investment-backed expectations' have been materially affected by the additional duty to retain the small percentage that must be used to support the structures protected by § 4.

480 U.S. at 497.

In this case the petitioner, Erickson/Naughton, has adduced evidence that only 27 acres of its total 1350 acres, or 2% of its coal property in Clearfield County have been affected by the Goss Run UFM designation. The petitioner, Machipongo, has asserted only 157 acres of its 2037 acres, or 8% of its total property has been affected. The petitioners both assert they do not know what purchase price was paid for their land, and have adduced no evidence that their reasonable investment backed expectations have been materially affected.

The petitioners have produced some evidence that the value of their property has been reduced. But mere reduction in value does not demonstrate a taking. *Penn Central, supra*; *Concrete Pipe & Products of California Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993).

Appendix G

In the words of *Keystone*, the petitioners have not come close to adducing evidence that they have been denied the economically viable use of their property and, therefore, have failed to show that their property has been taken by the Commonwealth. In my opinion, the Commonwealth is entitled to summary judgment.

s/ Samuel L. Rodgers
SAMUEL L. RODGERS, Senior Judge

APPENDIX H — RELEVANT REGULATION

25 Pa. Code § 86.130. Areas designated as unsuitable for mining.

(a) Under the criteria and procedures in §§ 86.121 — 86.129, the EQB has designated the areas described in subsection (b) as unsuitable for all or certain types of surface mining operations.

(b) The following is a list of descriptions of areas which are unsuitable for all or certain types of surface mining operations and where all or certain types of surface mining operations will not be permitted:

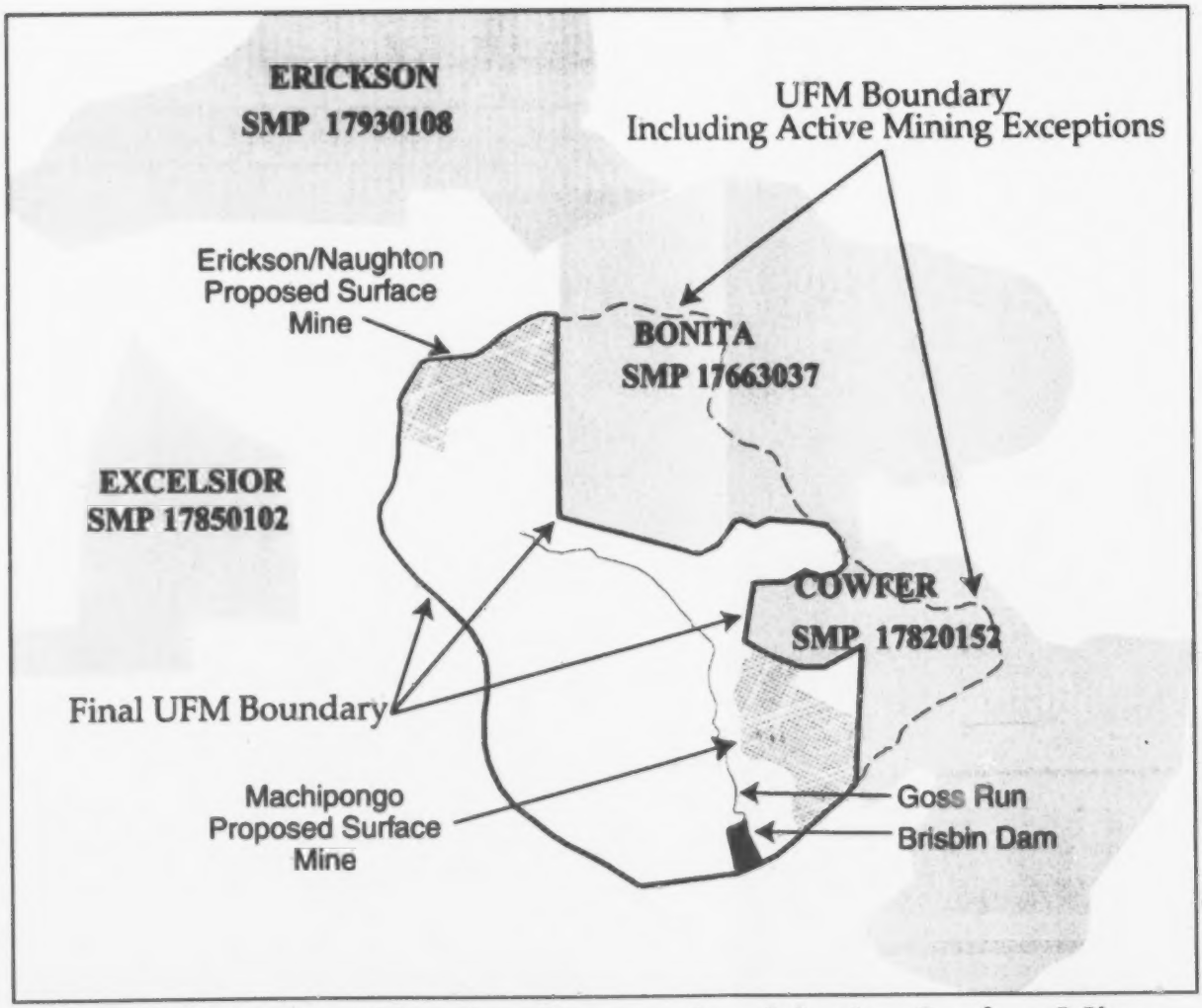
* * *

(14) The surface mineable coal reserves within the Goss Run watershed upstream of the Brisbin Dam, including a small tract of land within the watershed of the West Tributary to Goss Run, a total of approximately 555 acres (approximately 224.61 hectares), are designated unsuitable for all types of surface mining operations. This includes a land area beginning at the breast of the Brisbin Dam, thence due southwest to Pa. Route 153, thence north along the centerline of Pa. Route 153 to the intersection of Pa. Route 153 with township route T-657, thence north along the watershed divide between the Brisbin Dam drainage and the West Tributary drainage to a point at the intersection of the Goss Run and Little Beaver Run watershed divide, thence southwest along the Goss Run and Little Beaver Run watershed divide to a point at the intersection of the Brisbin Dam drainage divide, thence southwest along the Brisbin Dam drainage divide to the point of beginning; except that

the surface mineable coal reserves are not designated unsuitable for surface mining operations in the following areas:

> The permit areas of the James I. Cowfer Contracting, Inc. SMP 17663037 and James I. Cowfer Contracting, Inc. SMP 17820152, in accordance with § 86.121.

* * * *



Map of UFM Area Showing Proposed and Active Surface Mines